166-138

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 641.

THOMAS ALLEN, PLAINTIFF IN ERROR,

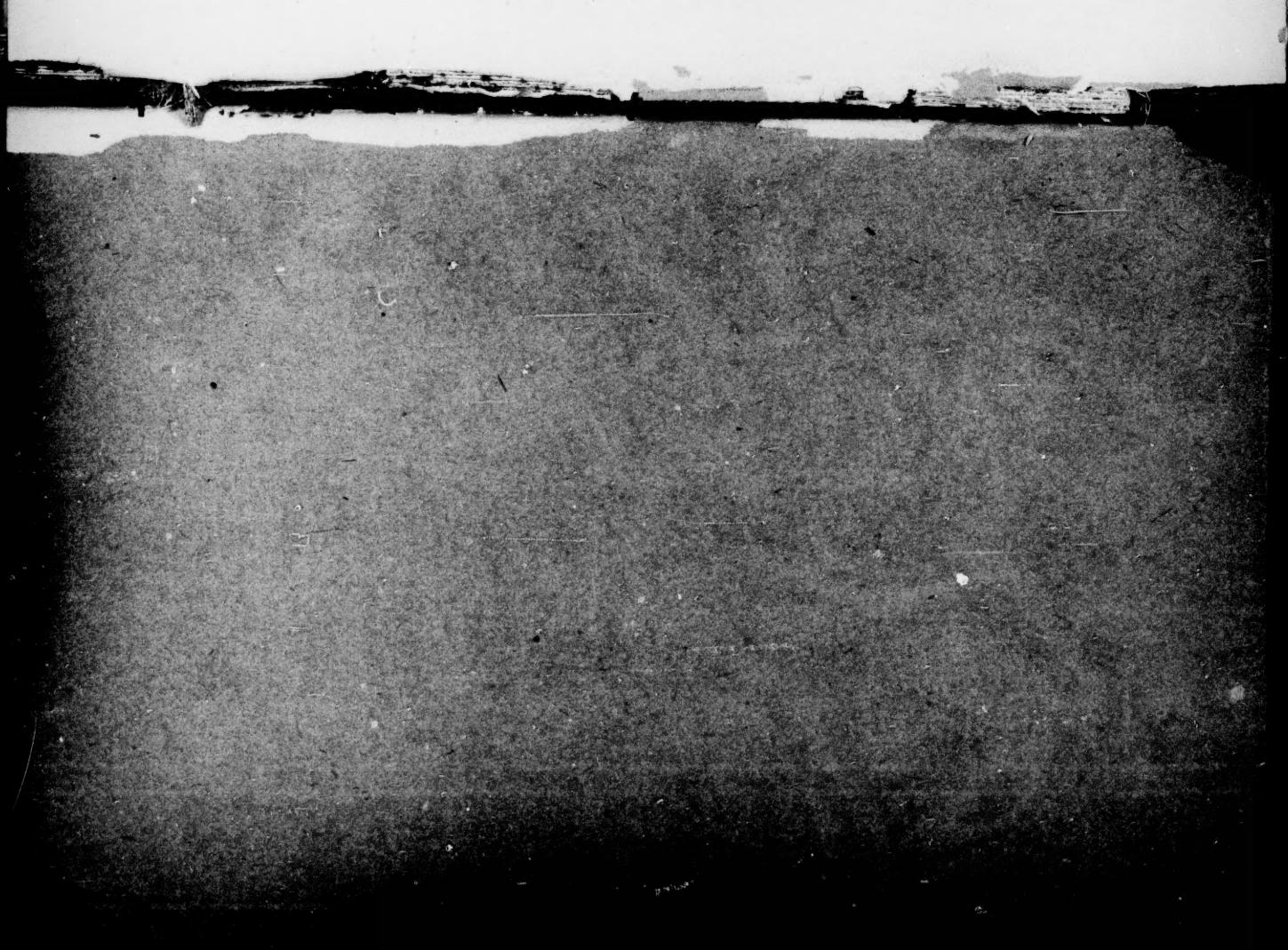
vs.

THE STATE OF GEORGIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

FILED NOVEMBER 28, 1896.

(16,420.)



(16,420.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 641.

THOMAS ALLEN, PLAINTIFF IN ERROR,

vs.

THE STATE OF GEORGIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF GEORGIA.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation	3	2
Proof of service of citation	4	2
Petition for writ of error	5	2
Order allowing writ of error	11	6
Bond	12	6
Assignment of errors	14	8
Bill of exceptions	18	11
Statement	18	11
Assignment of errors	19	11
Designation of parts of record	25	16
Judge's certificate to bill of exceptions	27	16
Acceptance of service of bill of exceptions	27	16
Clerk's certificate	28	17
Transcript of record	30	17
Indictment	30	17
Charge of the court	32	18
Motion for new trial	42	25
Order fixing motion for new trial for hearing	53	32
Order continuing motion for new trial	53	32
Order overruling motion for new trial	53	32
Affidavit of E. W. Pickett	54	32
J. M. Herndon	55	33

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 17, 1896.

	Original.	Print.
Affidavit of R. L. Smith	56	33
J. D. Grace	57	34
J. W. Preston *et al.*	57	34
T. F. Allen	58	35
Albert Jones	59	35
James M. Earp	60	35
B. E. Willingham	61	36
W. R. Phillips	61	36
Ben. L. Jones	62	37
E. W. Pickett	63	37
Harry C. Mix	64	38
W. B. Danniel	64	38
C. B. Massenberg	64	38
Walter B. Chapman	65	38
M. H. Taylor	65	39
Theo. W. Ellis	65	39
C. M. Wiley	66	39
C. L. Bartlett and N. E. Harris	66	39
W. A. Johnston	67	40
Testimony of Dr. J. S. Sullivan	68	40
Sol. Mack	70	42
J. B. Edwards	75	45
George M. Goodwin	80	48
James Cassidy	83	50
Dr. K. P. Moore	83	50
Toney Williams	85	51
Dr. A. J. Fuller	93	56
Wiley Allen	94	57
F. F. Walker	94	57
John Pitts	95	57
Frank Roquemore	95	57
Dr. R. B. Barron	96	58
J. C. Osborn	96	58
Mack Williamson	97	58
Sidney Simmons	97	58
Statement of defendant to the jury	98	59
Testimony of Bennett Jones	99	59
Sol. Mack (recalled)	100	60
Bob Tharp	101	61
George Mitchell	101	61
John Roberts	102	61
Agreement as to brief of evidence	102	61
Affidavit of poverty	104	62
Clerk's certificate	105	62
Order that cause be dismissed unless defendant surrender, &c.	107	62
Order dismissing writ of error	108	63
Order showing adjournment	109	64
Judgment on remittitur	110	64
Sentence	111	65
Certificate of clerk of superior court	112	65
Certificate of clerk of supreme court of Georgia	113	65

1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of Georgia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Thomas Allen, plaintiff in error, *vs.* The State of Georgia, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or
2 commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the sixteenth day of May, in the year of our Lord one thousand eight hundred and ninety-six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

Filed in office May 19th, 1896.

Z. D. HARRISON,
Clk S. C. Ga.

1—641

3 UNITED STATES OF AMERICA, *ss:*

To the State of Georgia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Georgia, wherein Thomas Allen is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this sixteenth day of May, in the year of our Lord one thousand eight hundred and ninety-six.

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

4 On this 19th day of May, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared J. A. Noyes before me, the subscriber, Logan Bleckley, a notary public in and for Fulton county, Georgia, and makes oath that he delivered a true copy of the within citation to W. G. Atkinson, governor of the State of Georgia.

J. A. NOYES.

Sworn to and subscribed the 19th day of May, A. D. 1896.

[Seal of Logan Bleckley, Notary Public, Fulton County, Ga.]

LOGAN BLECKLEY,
Notary Public, Fulton County, Ga.

Filed in office May 19, 1896.

Z. D. HARRISON,
Cl'k S. C. Ga.

I hereby acknowledge due and legal personal service of the within and foregoing citation in behalf of the appellee, & acknowledge receipt of a copy of the same.

Atlanta, Ga., May 18th, 1896.

J. M. TERRELL,
Att'y Gen'l of Ga.
ANDREW W. LANE,
Solicitor General Macon Circuit.

5 Hon. Edward D. White, justice of the Supreme Court of the United States, assigned to the fifth judicial circuit:

The petition of Thomas Allen showeth:

First. That he is a citizen of the United States and a citizen of the State of Georgia.

Second. Petitioner further showeth that he is now confined in the

common jail of Bibb county, Georgia, one of the counties in the western division of the southern district of the State of Georgia; that he is held and confined in said jail on a capital conviction for murder, and that under a sentence of the superior court of the county of Bibb, which sentence was imposed on the 6th day of May, 1896, he is to be executed in the jail yard of said county jail on Friday, May 22, 1896.

Third. Petitioner showeth that at the November term, 1894, of the superior court of the county of Bibb, State of Georgia, he was indicted for the offense of murder, and that at and during said term he was put upon trial and found guilty by the jury.

Fourth. At and during said term petitioner in due form of law, according to the practice of the State of Georgia, made a motion for a new trial upon the grounds which will appear in the record herewith presented, and that after the same had been regularly continued it come on for a hearing before the Hon. J. M. Griggs, judge of the superior court of the Pataula circuit, who had presided on the trial of petition- at Dawson on January 7, 1895, and who reserved his decision until January 23, 1895, when on said date, at Dawson, Georgia, said motion of petitioner was by said judge overruled and a new trial denied.

Fifth. Thereafter, on February 11, 1895, a bill of exceptions to said ruling was tendered and certified by said presiding
6 judge, and on February 14, 1895, duly served on counsel for the State, and on February 22, 1895, the said bill of exceptions, together with the record in said cause, was filed in the supreme court of the State of Georgia, said court being thus vested with full jurisdiction to hear and determine the same upon its merits.

Sixth. Thereafter, on March 4, 1895, the regular term of the supreme court began, and the following order was passed, to wit:

"This being a case of capital felony, and the plaintiff in error being under sentence of death, and it appearing to the court by sufficient evidence upon the call of the case in its proper order for argument that the plaintiff in error has escaped from the jail in which he was confined and is now at large, a fugitive from justice, so that no judgment this court might pronounce could be executed, either by a resentence in case of affirmance or by a new trial in case of a reversal, it is therefore ordered that the writ of error be dismissed unless he shall, within sixty days from this date, surrender himself to the custody of the proper officer or shall be recaptured, so as to be subject to the jurisdiction of this court, and shall furnish evidence thereof by filing the same in the clerk's office. It is further ordered that the solicitor general may produce to this court evidence of such surrender or recapture; and if, before the expiration of the said sixty days, the plaintiff in error is again in custody, the case will be reinstated and reset for argument."

At said time petitioner was ready, through his counsel, to prosecute said writ of error to a conclusion.

Seventh. Thereafter, on May 6, 1895, the following order was passed, to wit:

3 UNITED STATES OF AMERICA, *ss:*

To the State of Georgia, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Georgia, wherein Thomas Allen is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this sixteenth day of May, in the year of our Lord one thousand eight hundred and ninety-six.

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

4 On this 19th day of May, in the year of our Lord one thousand eight hundred and ninety-six, personally appeared J. A. Noyes before me, the subscriber, Logan Bleckley, a notary public in and for Fulton county, Georgia, and makes oath that he delivered a true copy of the within citation to W. G. Atkinson, governor of the State of Georgia.

J. A. NOYES.

Sworn to and subscribed the 19th day of May, A. D. 1896.

[Seal of Logan Bleckley, Notary Public, Fulton County, Ga.]

LOGAN BLECKLEY,
Notary Public, Fulton County, Ga.

Filed in office May 19, 1896.

Z. D. HARRISON,
Cl'k S. C. Ga.

I hereby acknowledge due and legal personal service of the within and foregoing citation in behalf of the appellee, & acknowledge receipt of a copy of the same.

Atlanta, Ga., May 18th, 1896.

J. M. TERRELL,
Att'y Gen'l of Ga.
ANDREW W. LANE,
Solicitor General Macon Circuit.

5 Hon. Edward D. White, justice of the Supreme Court of the United States, assigned to the fifth judicial circuit:

The petition of Thomas Allen showeth:

First. That he is a citizen of the United States and a citizen of the State of Georgia.

Second. Petitioner further showeth that he is now confined in the

common jail of Bibb county, Georgia, one of the counties in the western division of the southern district of the State of Georgia; that he is held and confined in said jail on a capital conviction for murder, and that under a sentence of the superior court of the county of Bibb, which sentence was imposed on the 6th day of May, 1896, he is to be executed in the jail yard of said county jail on Friday, May 22, 1896.

Third. Petitioner showeth that at the November term, 1894, of the superior court of the county of Bibb, State of Georgia, he was indicted for the offense of murder, and that at and during said term he was put upon trial and found guilty by the jury.

Fourth. At and during said term petitioner in due form of law, according to the practice of the State of Georgia, made a motion for a new trial upon the grounds which will appear in the record herewith presented, and that after the same had been regularly continued it come on for a hearing before the Hon. J. M. Griggs, judge of the superior court of the Pataula circuit, who had presided on the trial of petition- at Dawson on January 7, 1895, and who reserved his decision until January 23, 1895, when on said date, at Dawson, Georgia, said motion of petitioner was by said judge overruled and a new trial denied.

Fifth. Thereafter, on February 11, 1895, a bill of exceptions to said ruling was tendered and certified by said presiding
6 judge, and on February 14, 1895, duly served on counsel for the State, and on February 22, 1895, the said bill of exceptions, together with the record in said cause, was filed in the supreme court of the State of Georgia, said court being thus vested with full jurisdiction to hear and determine the same upon its merits.

Sixth. Thereafter, on March 4, 1895, the regular term of the supreme court began, and the following order was passed, to wit:

"This being a case of capital felony, and the plaintiff in error being under sentence of death, and it appearing to the court by sufficient evidence upon the call of the case in its proper order for argument that the plaintiff in error has escaped from the jail in which he was confined and is now at large, a fugitive from justice, so that no judgment this court might pronounce could be executed, either by a resentence in case of affirmance or by a new trial in case of a reversal, it is therefore ordered that the writ of error be dismissed unless he shall, within sixty days from this date, surrender himself to the custody of the proper officer or shall be recaptured, so as to be subject to the jurisdiction of this court, and shall furnish evidence thereof by filing the same in the clerk's office. It is further ordered that the solicitor general may produce to this court evidence of such surrender or recapture; and if, before the expiration of the said sixty days, the plaintiff in error is again in custody, the case will be reinstated and reset for argument."

At said time petitioner was ready, through his counsel, to prosecute said writ of error to a conclusion.

Seventh. Thereafter, on May 6, 1895, the following order was passed, to wit:

"This case came before the court upon a transcript of the record from the superior court of Bibb county, and—

It appearing that the plaintiff in error did not, within the time limited in the order heretofore passed in this case, surrender himself to the custody of the proper officer so as to be subject to the jurisdiction of this court, and furnish evidence thereof by filing the same in the clerk's office: and it further appearing that he has not been rearrested since his escape from jail, it is now ordered that the writ of error in this case be finally dismissed."

Eighth. On July 13, 1895, the said judgment and order of the supreme court was made the judgment of the superior court of Bibb county.

Ninth. On April 29, 1896, petitioner was sentenced to death
7 by Hon. John S. Candler, judge of the superior courts of the Stone Mountain circuit, presiding in Bibb superior court.

Tenth. The supreme court of the State of Georgia adjourned for the March term, 1895, the term at which this case was dismissed, on October 5, 1895.

Eleventh. Petitioner shows that under article one, section one, paragraph three, of the constitution of the State of Georgia, "No person shall be deprived of life, liberty, or property except by due process of law;" and petitioner avers that the dismissal of said case without a hearing upon the merits was a denial of due process of law within the meaning of the said provision of the constitution of the said State of Georgia.

Twelfth. Petitioner shows that article I, section I, paragraph IV, of the constitution of the State of Georgia provides as follows: "No person shall be deprived of the right to prosecute or defend his own case in any of the courts of this State in person or by attorney or both."

Petitioner represents that the denial of the right to do so in this case was a denial of due process of law under the constitution of the State of Georgia and under the Constitution of the United States, and that its denial was in violation of both.

Thirteenth. Petitioner shows that under article I, section I, paragraph V, of the constitution of the State of Georgia "Every person charged with an offense against the laws of this State shall have the privilege and benefit of counsel."

Petitioner shows that the dismissal of his said case without a hearing when his counsel was ready to proceed was a denial of a constitutional right given by this section of the constitution
8 of the State of Georgia, and that its denial deprived him of due process of law.

Fourteenth. Petitioner shows that by article I, section I, paragraph II, of the constitution of the State of Georgia, "Protection to persons and property is the paramount duty of the government and shall be impartial and complete."

Petitioner represents that the dismissal of this case without a hearing is a violation of this section of the constitution of the State of Georgia, and that thus dismissing his case without passing upon its merits when the court had jurisdiction is a denial of this impar-

tial and complete protection and a denial of due process of law within the meaning of the constitution of the State of Georgia and of the Constitution of the United States.

Fifteenth. Petitioner contends that it was essential to due process of law under the constitution of the State of Georgia that this case be heard and disposed of on its merits, and that he be afforded the protection guaranteed by the constitution of that State, and that he be given the benefit of counsel in the hearing before the supreme court of that State.

Petitioner says that it was essential to due process of law under the constitution of the State of Georgia and of the United States that his case be continued upon the docket of the supreme court until the end of the first term of the supreme court and until the end of the second term of said supreme court or until he was again brought within the jurisdiction of said court, and that the disposition of it heretofore set out is in violation of due process of law under the constitution of the State of Georgia and of the Constitution of the United States.

Sixteenth. Petitioner says that the right to have said due process of law in the courts of the State of Georgia is guaranteed by
9 the Constitution of the United States, in article XIV of the amendments to said Constitution, as follows: "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States," and the constitution of the State of Georgia, article I, section I, paragraph 25, provides as follows: "All citizens of the United States resident in this State are hereby declared citizens of this State; and it shall be the duty of the General Assembly to enact such laws as will protect them in the full enjoyment of the rights, privileges and immunities due such citizenship."

Petitioner says that the dismissal of his said case is an abridgement and denial of a privilege of a citizen of the United States within the meaning of the Constitution of the United States and of the constitution of the State of Georgia.

Seventeenth. Petitioner further shows that by article XIV of the amendments to the Constitution of the United States it is provided as follows: "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

Petitioner says that the dismissal of the said case by the supreme court of the State of Georgia was a denial of the equal protection of the laws, and that it is a deprivation of his life without due process of law, the merits of his said case not having been passed upon by said court.

Petitioner says that he is not outlawed by an escape from custody, and that due process of law would have been to have allowed the case to have remained on the docket to — heard in the event the defendant, this petitioner, should be brought back within the jurisdiction of the courts of this State, and that the said dismissal was erroneous and in violation of the Constitution of the United States.

Eighteenth. Petitioner says that the said order of dismissal
10 was passed without evidence; that it was passed before the end of the term of said court; that an insufficient time was given in which the judgment was entered; that the said judgment was passed in violation of the right- of petitioner as a citizen of the State of Georgia and of the United States, for the reasons above stated, and that if the decision of the supreme court of Georgia is to be upheld by any law of the said State, then the said law is in contravention of the Constitution of the United States and without power in the State to enforce the same.

Nineteenth. Petitioner presents with this petition a complete and certified transcript of the record of the said case in the supreme court of the State of Georgia; also transcript showing the action of the superior court of Bibb county; also transcript showing the adjournment of the supreme court of Georgia on October 5, 1895.

Wherefore, the premises considered, petitioner prays the issuing of a writ of error, to be issued from the Supreme Court of the United States, directed to the supreme court of the State of Georgia, requiring said supreme court to certify and send up all the record and proceedings in said case, to the end that justice may be done in the premises and the aforesaid judgment of dismissal by the supreme court of the State may be declared to be null and void and in violation of the constitutional right- of petitioner under the constitution of Georgia and of the United States, and that an order and judgment of the Supreme Court of the United States may be had directing and requiring the said supreme court of the State of Georgia to reinstate upon the docket of said court, for a hearing upon the merits, the case of petitioner, so that right and justice may be done to petitioner, and for such other order as may be necessary in the premises.

This May 16, 1896.

THOMAS ALLEN,
By his attorney, W. C. GLENN.

11 Writ of error allowed as prayed for, to operate as a supersedeas and returnable according to law, bond to be furnished in the sum of two hundred and fifty dollars, which has been approved by me, the whole according to law.

E. D. WHITE.

Filed in office May 19th, 1896.

Z. D. HARRISON,
Clk S. C. Ga.

12 STATE OF GEORGIA, }
Bibb County. }

Know all men by these presents that I, J. W. Cabaniss, of the county of Bibb, said State, have this the 14th day of May, 1896, constituted and appointed W. C. Glenn, Esq., of the city of Atlanta, said State, my attorney-in-fact, who is hereby empowered and authorized, for me and in my name, to sign and seal and proper bond for cost required, not to exceed two hundred and fifty dollars, as

security therein, to be filed in the Supreme Court of the United States by Thomas Allen, of said State, who has applied for writ of error therein from the supreme and superior courts of the State — Georgia in the case of The State of Georgia *vs.* said Thomas Allen, who has been sentenced to death for murder.

Interlineations in sixth line made before signing.

J. W. CABANISS. [L. S.]

In presence of—
W. E. DUNWODY,
Not. Pub., Bibb Co., Ga.

STATE OF GEORGIA, }
County of Bibb. }

I do certify that J. W. Cabiniss, whose name is signed to the accompanying power of attorney, is worth, over and above his debts and liabilities and above the homestead exemption allowances under the laws of said State, the amount of two hundred and fifty dollars ($250.00), and is good and sufficient security on bond or obligation for the payment of that sum.

May 14th, 1896.

HOWARD M. SMITH,
Pres't the Guarantee Co. of Ga.

Filed in my office May 19th, 1896.

Z. D. HARRISON,
Cl'k S. C. Ga.

13 GEORGIA, }
Fulton County. }

Know all men by these presents that we, Thomas Allen, as principal, and J. W. Cabaniss, as surety, are held and firmly bound unto the State of Georgia in the full and just sum of two hundred and fifty dollars, to be paid to the said defendant; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this the — day of May, 1896.

Whereas late-, at the supreme court of the State of Georgia, in a suit depending in said court between Thomas Allen, plaintiff in error, and The State of Georgia, defendant in error, a judgment was rendered against the said Thomas Allen, and the said Thomas Allen having obtained a writ of error and filed a copy thereof in the office of the clerk of the Supreme Court of the United States to reverse the said judgment in the aforesaid suit, and a citation directed to the said State of Georgia, citing and admonishing it to be and appear at a session of the Supreme Court of the United States, to be held in the city of Washington, on the second Monday in October, 1896, next:

Now, the condition of the above obligation is such that if the said Thomas Allen shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good,

then the above obligation to be void; else to remain in full force and virtue.

THOMAS ALLEN, [SEAL.]
Att'n'y W. C. Glenn.
J. W. CABANISS, [SEAL.]
By W. C. GLENN.

Signed, sealed, and delivered in the presence of—

Approved by—
E. D. WHITE,
Associate Justice of the Sup. Ct. U. S.

Filed in office May 19, 1896.

Z. D. HARRISON,
Clk S. C. Ga.

14 The Supreme Court of the United States, October Term, 1896.

THOMAS ALLEN, Plaintiff in Error,
vs.
THE STATE OF GEORGIA, Defendant in Error.

Assignment of Errors.

Afterwards, to wit, on June the 15th, in the year 1896, at the October term for 1896 of the Supreme Court of the United States, at the Capitol, in the city of Washington and District of Columbia, comes Thomas Allen, by his attorney, W. C. Glenn, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

I.

That the supreme court of the State of Georgia erred in dismissing the writ of error in the above-stated case.

II.

That the supreme court of the State of Georgia erred in passing, on March 4th, 1895, the order following:

"This being a case of capital felony and the plaintiff in error being under sentence of death, and it appearing to the court by sufficient evidence, upon the call of the case in its proper order for argument, that the plaintiff in error has escaped from the jail in which he was confined and is now at large a fugitive from justice, so that no judgment that this court might pronounce could be executed either by a resentence in case of affirmance or by a new trial in the case of reversal, and it is therefore ordered that the writ of error be dismissed unless he shall, within sixty days from this date, surrender himself to the custody of the proper officer, or shall be recaptured, so as to be subject to the jurisdiction of this court, and shall furnish evidence thereof by filing the same in the clerk's office.

It is further ordered that the solicitor general may produce to this court evidence of surrender or recapture, and if before the expiration of the said sixty days the plaintiff in error is again in custody, the case will be reinstated and reset for argument."

This order was error, first, because there was at the time no sufficient or legal evidence before the supreme court of the State of Georgia on which to pass the same; second, because the said order was a violation of due process under the constitution of the
15 State of Georgia; third, because the said order was a denial of due process under the Constitution of the United States; fourth, because the time limited in the order was too short, and it ought to have extended until the beginning of the next term of the court, and, in any event, to the end of the then term.

III.

That the supreme court of the State of Georgia erred in passing, on May 6th, 1895, the following order:

"This case came before the court upon a transcript of the record from the superior court of Bibb county, and—

"It appearing that the plaintiff in error did not, within the time limited in the order heretofore passed in this case, surrender himself to the custody of the proper officer, so as to be subject to the jurisdiction of this court, and furnish evidence thereof by filing the same in the clerk's office; and it further appearing that he has not been re-arrested since his escape from jail, it is now ordered that the said bill of exceptions be finally dismissed."

This was error because, first, by the terms of the order the burden was put upon this plaintiff in error to establish his right to have his case decided on the merits; second, because it was a denial of due process of the law, of the constitution of the State of Georgia, and was also in violation of the provisions of the constitution of the State of Georgia which guaranteed due process of law and which sections are quoted in the petition for writ of error, and are hereby incorporated into and asked to be taken into as a part of this assignment; third, because the passage of said order and judgment dismissing this case was a denial of due process of law guaranteed by the Constitution of the United States; fourth, the said order was passed before the end of the term and at a time when it was probable the defendant might be brought within the jurisdiction of the court; fifth, because the said order should have been made conditional and the time therein should have been extended to the beginning of the next term of the supreme court, and at least until the 5th of October, 1896, the date of the adjournment of the said supreme court; sixth, because the said order was a denial of due process of law, in this, that the said case should have been kept upon the docket of the said supreme court of the State
16 of Georgia until the defendant was again brought within the jurisdiction of the court; seventh, that the said supreme court of the State of Georgia had no power to pass said order, because the same was a denial of due process of law under the Con-

stitution of the United States; eighth, because if said order be based upon any law or statute or usage sanctioned by the State of Georgia, then the said law, statute, or usage is in violation of the Constitution of the United States and is beyond the power of the State of Georgia to enforce.

IV.

Because it is essential to due process of law, within the meaning of the Constitution of the United States, that the said case of Allen against the State be disposed of upon its merits, and a dismissal of it in the manner stated in the record and upon the grounds therein is in violation of the Constitution of the United States, which prohibits a denial to any person of due process of law.

V.

That the supreme court of the State of Georgia in passing this order transcended its power and passed the same without sufficient evidence, and put upon the plaintiff in error Allen the burden of showing his right to a hearing in the supreme court of the State of Georgia, and that this was a denial of due process of law under the Constitution of the United States.

VI.

That the supreme court of the State of Georgia erred in holding that its jurisdiction in the said case could be exercised to dismiss this case without a hearing, and that in thus holding it denied to the plaintiff in error Allen due process of law under the Constitution of the United States.

Wherefore the said Thomas Allen prays that the order and judgment of the supreme court of the State of Georgia, passed on the 6th of May, 1895, which is the final judgment in the said
17 case, be reversed, and that an order and judgment of this honorable court may be entered directing the said supreme court of the State of Georgia to reinstate upon the docket of the said court the case of petitioner, and that the said case be reinstated upon its docket and set down and assigned for hearing upon its merits, and that such further order, direction, and judgment be had and entered in this honorable court, to the end that the matter then pending in the supreme court of the State of Georgia be adjudicated upon the merits and a decision thereon be had upon the bill of exceptions pending in the said court prior to the dismissal of the same by the supreme court of the State of Georgia, and for such other order, judgment, and direction of this honorable court as may be necessary to fully protect petitioner in the exercise of all his rights as a citizen of the United States.

W. C. GLENN,
Attorney for Thomas Allen, 401, 402, 403, 404,
Temple Court, Atlanta, Ga.

W. C. GLENN,
DAN'L W. ROUNTREE,
Of Counsel.

Filed in office June 2nd, 1896.

Z. D. HARRISON,
Cl'k S. C. Ga.

18 STATE OF GEORGIA, }
Bibb County. }

To the supreme court of Georgia, October term, 1894:

Be it remembered that on the 27th day of November, 1894, during the regular November term of the superior court of said county, his honor James M. Griggs, one of the judges of the superior court of said State, presiding, the case of The State *vs.* Thomas Allen, the same being an indictment for murder in said court, came on to be heard; counsel for the State and the defendant announcing ready for trial and a jury having been regularly empanelled to try said case, all of the evidence both for the State and for the defendant was introduced and the case closed. A brief of said evidence agreed upon by counsel, approved by the court, and filed as such, is here specified and not embraced in the bill of exceptions as necessary for a clear understanding of the case. After the charge of the court, the jury rendered and returned a verdict of guilty; whereupon counsel for defendant made a motion for new trial, and on the 22nd day of December, 1894, during said term of the court, filed the same, and the hearing thereof was set for the seventh day of January, 1895, by order of the court, made on said 22nd day of December, 1894, and upon said 7th day of January, 1895, the case was heard, and on the 23rd day of January thereafter the court overruled and denied said motion for new trial upon each and every ground therein; which motion is here specified, as necessary for a clear understanding of the case, as a part of the record. Be it further remembered that after the approval of the brief of evidence and of the grounds of the motion for new trial and after argument the court appended a note to the 16th ground of said motion for new trial, the same being the 17th assignment of error, as follows: "It was admitted that the defendant fired the shot that killed Carr." The said not- was correct, but defendant'- counsel in making said admission earnestly contended that the shooting was accidental; that defendant was unconscious of the shooting at the time, and on account of his mental condition at the time has never been able to recollect said shooting, and that therefore it was more prob-
19 able that the shooting was the result of accident and without malice. Defendant excepts to the said ruling of the court and assigns error specifically upon each and every of said grounds, to wit:

1. The court erred in refusing a new trial and overruling said motion for new trial upon the ground that the verdict of the jury was contrary to law.

2. The court erred in overruling said motion upon the ground that the verdict of the jury was contrary to law and the evidence and strongly and decidedly against the weight of the evidence.

3. The court erred in overruling said motion upon the ground

that the verdict of the jury is without evidence to support the finding of the jury and against the principles of justice.

4. The court erred in overruling said motion upon the ground that the jurors sworn to try the case were not all impartial jurors, but were biased and prejudiced against the defendant, and did not, therefore, render a true and an impartial verdict, to wit, James M. Earp, one of the jurors, had formed and expressed an opinion of the guilt of the defendant before his qualification as a juror, and had expressed his opinion in such a manner as to show his bias and prejudice against the defendant and his partiality to the State in this, to wit, that about one week after the killing of Charles Carr, in the presence of E. W. Pickett, J. M. Herndon, and others, in a conversation in which he used bitterly unfriendly language against the defendant, amongst other things, then and there used and uttered the following language, to wit: "If I get on the jury, I'll be damned if I don't hang him;" which said language was not known to or communicated to the defendant or any of his counsel before said Earp was sworn as a juror in said case; and, further, to wit, W. A. Johnson, another of the jurors who tried said case, on Monday, the 26th day of November, 1894, after the case had been called and continued over until Tuesday, the 27th of November, the next day, to await the arrival of an absent witness for the defendant, and after the said Johnson had been summoned as a juror, stated to R. L. Smith, in the presence of J. D. Grace, in regard to this case, referring to the case of the State against this defendant, "In the Amerson case I don't know so much about it, but, I think, there will be some neck-stretching in the Allen case."

5. The court erred in sustaining the State's objection to the following question asked by defendant's counsel of Wyley Allen, a witness for defendant: "State to the jury in your own way the peculiarities of his mind when Tom is sober as compared with his mind when he is drinking. First compare his mind with ordinary people and state the difference between it and any other ordinary mind when he is sober and when he is drinking;" the object of said question being to show weakness of mind in the defendant and peculiar acts; that he was capricious and boyish; that he had hallucinations and false imaginings when sober, and to get details of such facts.

6. The court erred in rejecting the following question to witness Wyley Allen:

Mr. PRESTON: "I will ask you if he has any peculiarities or weakness of mind; if so, if you know them, please state them."

7. The court erred in refusing to allow witness Wyley Allen to answer the following question: "I will ask you whether or not your brother (Tom) has any physical or other weakness or other injuries from which he may have suffered mentally; if so, state them."

8. The court erred in sustaining the State's objection to the following question asked by the defendant's counsel of Wyley Allen and in holding the same irrelevant: "State to the jury from your own observation when your brother Tom is under the influence of

intoxicants what his condition of mind is—whether he had sense or no sense;" the object of said question being similar to the
21 object of the question set out in the 5th ground of this motion, but, further, to show that the defendant's mind when sober, being weak and unsound, was absolutely and easily dethroned by liquor.

9. With no dialogue relative to the particular subject except the following:

Mr. PRESTON: I will ask you if you know anything about the character of mind—if he had any evidence of weakness of mind. If so, state it.

WYLEY ALLEN: I can only tell you the way he acts when he gets tight.

Mr. PRESTON: If the court will permit it, for the purpose of showing weakness of mind, I will ask it in that form.

The COURT: You had better ask him what his condition of mind is when he is drunk.

Mr. PRESTON: When he is not drunk?

The COURT: The witness says that he don't know only when he is tight.

Witness ALLEN: I say his mind is not right when he is tight.

The COURT: Don't consider that, gentlemen of the jury. You may inquire into the condition of this defendant's mind ordinarily.

Mr. PRESTON: What is the condition of this man's mind when he is sober? What is the condition of his mind within four or five years?

Answer. It is not good. Of course, it is worse at times than it is at others.

And directly after said dialogue the court prevented the witness from answering the following question: What is the character of mind of Thomas Allen when he is sober, whether it is a good mind or a weak mind? For as soon as said question was asked the court said, "He has already answered that." Said question was asked for the purpose of showing mental deficiency on the part of defendant when sober, and the ground not having been up to that time covered by any question that had been asked.

10. The court erred in sustaining the objection to the following question asked of Wyley Allen on the ground that the same was
22 irrelevant: I will ask you if defendant has any peculiarities or weakness of mind. If so, if you know them, state them.

11. The court erred in rejecting the testimony of Wyley Allen, one of the witnesses for the defendant, as appears from the colloquy, upon which the assignments of error are hereinbefore specially made, in the 5th, 6th, 7th, 8th, 9th, and 10th assignment of error. The defendant's counsel, offering the said witness to prove the weakness of mind of the defendant and specific acts, then stated to the court substantially, to wit, that he was maudling, capricious, boyish; that he showed weakness by oversympathy; would weep like a child about matters that ordinary men would not; placed no value on money; would spend it without equivalent; that he had false imaginings

and hallucinations, at one time, a few months before the homicide, at church, coming from the spring, stating that he had killed two negroes down there, which was not a fact; that when he was drunk he was crazy, absolutely; that liquor affected him differently from other people; that he had been injured by a severe wound on the back of his neck, which affected his mind and constitution; said testimony being offered, as distinctly stated by the court, not to establish insanity, but that the jury might consider the same for either the purpose of enabling the jury to determine whether the killing was the result of accident or carelessness or in mitigation of the punishment and to show absence of motive or malice.

12. The court erred in sustaining objection to the following question asked F. F. Walker: "I will ask you if the defendant had the same characteristics of soundness of mind that ordinary people have when sober;" the object being to show the greater probability that the killing was done accidentally and to show weakness of mind and such a degree of irresponsibility as would cause the jury to consider in fixing the punishment.

13. The court erred in instructing the jury in the following language: "You are not authorized to go outside of the evidence
23 to hunt up a doubt, nor are you authorized to hunt for a doubt anywhere. The doubt must hunt you up; it must seize upon your minds; it must ari-e of itself and must arise out of the evidence or lack of evidence in the case."

14. The court erred in instructing the jury in the following language: "If the accused killed Carr while drunk and in consequence of his drunkenness did not comprehend the nature of the act, he would be responsible for it under the law. If the drunkenness produced a temporary frenzy, madness, or unsoundness of mind in the defendant he would not be excused or held irresponsible for the act done by him while laboring under such temporary insanity, madness, or unsoundness of mind thus produced, it being his own voluntary act, and, unless there are other circumstances surrounding the act to reduce the crime, the killing under such circumstances would be murder."

15. The court erred in instructing the jury in the following language: "I charge you, gentlemen of the jury, in this connection, that to point a pistol wilfully and intentionally at another, whether in play or in earnest, is an unlawful act, and if you believe from the evidence in this case that this defendant intentionally pointed a pistol at the deceased, and if you believe further that that act of itself was one that naturally tended in its consequences to take the life of a human being, you would not be authorized to find a verdict of involuntary manslaughter, but the law would require you to find the defendant guilty of murder."

16. The court erred in instructing the jury in the following language: "I charge you further that furnishing whiskey to a drunken man is not of itself such a contribution as the law contemplates in order to make the party who furnishes the whiskey equally responsible with the party who commits the crime;" the error insisted on being that the court said nothing else to the jury upon the sub-

ject; that the court did so withdraw from the jury the fact that the deceased did so furnish whiskey to the defendant while drunk,
24 so as to prevent the jury from considering such fact in passing upon the question whether they should find a plain verdict of guilty or recommend penitentiary imprisonment for life.

Defendant's counsel having insisted in their argument before the jury upon the consideration of such fact for such purpose, and having requested the court to instruct the jury as follows: "The court will further charge you upon the question of contribution to the accident, if it be an accident, that you may consider also the acts of the deceased, whether or not he contributed to the accident by selling liquor to the defendant and thereby rendering him less careful with the pistol;" which request the court refused.

17. The court erred in instructing the jury in the following language: "The defendant has a right to put his character for peace and quiet in a case of this sort in issue, and when it is put in issue by the defendant it is the duty of the jury to look to the evidence upon the question in order, not to say whether or not the defendant is guilty, but to determine what was the intention of the defendant at the time the act was committed."

18. The court erred in instructing the jury in the following language: "If he killed the deceased accidentally in the commission of an unlawful act, then involuntary manslaughter ought to be your verdict, unless you believe that the unlawful act tended in its consequences naturally to take away the life of a human being, in which case your verdict ought to be murder."

19. The court erred in instructing the jury in the following language: "In case you find the defendant guilty, gentlemen of the jury, you have a right, without any reason on earth or without any suggestion from me or anybody else, to recommend that he be imprisoned in the penitentiary for life. It is entirely with you. If you make that recommendation it will be the duty of the
25 court to enforce it." Plaintiff in error says that this was all the court said to the jury upon this subject, and he complains that the court, in his instructions, submitted this question to the jury as one upon which they might act arbitrarily and not otherwise; that such instructions, in effect, prevented the jury from rationally considering all of the evidence in the case with reference to this question, and said instruction assumed in effect that there were no facts or reasons for the jury to consider and act upon in making recommendation.

20. The court erred in refusing to charge when requested in writing to do so under the rule the following: "The court will further charge you upon the question of contribution to the accident, if it be an accident, that you may consider also the acts of the deceased, whether or not he contributed to the accident by selling liquor to the defendant, and thereby rendering him less careful with his pistol."

And as the facts do not appear of record, defendant prays that this his final bill of exceptions may be signed and certified, and that the same may be by writ of error taken to the October term,

1894, of the supreme court of said State, that the errors complained of may be considered and corrected, herein specifying as necessary to a clear understanding of the case the following as parts of the record, to wit:

1. The bill of indictment, with the entries thereon, including the verdict of the jury.

2. The charge of the court as approved and filed in office.

3. The motion for a new trial, together with all of the entries thereon, including date of filing, orders setting same for hearing and other orders of the court thereon, an order overruling the motion, acknowledgment of service, notes by the court, and all entries thereon.

4. The affidavits attached to said motion for new trial, to wit (for the plaintiff in error), affidavits of E. W. Picket, J. M. Herndon, R. L. Smith, J. D. Grace, J. W. Preston, W. J. Grace, James H. Blount, Jr., and plaintiff in error, Thomas Allen, Albert Jones; for the State, affidavit of J. M. Earp, B. E. Willingham, W. R.
26 Phillips, Ben. J. Jones, 2nd affidavit of E. W. Picket, Harry C. Mix, W. B. Daniels, C. B. Massenburg, Walter B. Chapman, M. H. Taylor, Theo. W. Ellis, C. M. Wyley, C. L. Bartlett, W. A. Johnson.

5. The brief of the evidence, including statement of the defendant, Thomas Allen, and all the entries thereon, including the agreement of counsel, approval of the court, and all other entries thereon.

6. The affidavit *in forma pauperis* of Thomas Allen.

J. W. PRESTON,
DUPONT GUERRY,
J. H. BLOUNT, JR.,
Att'ys for Plaintiff in Error.

27 I do certify that the foregoing bill of exceptions is true and specifies all of the evidence and specifies all of the record material to a clear understanding of the errors complained of, and the clerk of the superior court of Bibb county is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified and certify the same as such, and cause the same to be transmitted to the October term, 1894, of the supreme court, that the errors alleged to have been committed may be considered and corrected.

J. M. GRIGGS,
J. S. C., P. C.

Febt. 11th, 1895.

MACON, GA., *Feb'y* 14, 1895.

Due and legal service of this bill of exceptions and of the signing and certifying of the same hereby acknowledged and copy waived.

February 14th, 1895.

WILLIAM H. FELTON, JR.,
Solicitor General, Macon Circuit.

28 GEORGIA, }
Bibb County. }

CLERK'S OFFICE, SUPERIOR COURT.

I, Robert A. Nisbet, clerk of said court, do certify that the foregoing ten pages constitute the original bill of exceptions just as the same was filed in the within-stated case.

[SEAL.] Witness my official signature and seal of office this 21st day of February, 1895.

ROB'T A. NISBET, *Clerk.*

Filed in office Feb. 14, 1895.

ROB'T A. NISBET,
Clerk Bibb Superior Court.

29 [Endorsed:] File —, No. —. No. 3, criminal docket. March term, 1895, supreme court of Georgia. Allen *versus* The State. Bill of exceptions. Filed in office Feb'y 22, 1895. Logan Bleckley, D. C. S. C., Ga.

30 STATE OF GEORGIA, }
Bibb County. }

The grand jurors sworn, chosen, and selected for the county of Bibb, to wit:

1, W. M. Gordon, foreman,	
2, W. E. Hill,	13, C. B. Willingham,
3, B. C. Smith,	14, W. B. Chapman,
4, C. E. Damour,	15, T. C. Burke,
5, T. C. Hendrix,	16, C. C. Balkcom,
6, W. S. Lowe,	17, J. J. Cobb,
7, Wm. Beddingfield,	18, R. E. Boweman,
8, J. B. Mathews,	19, Legare Walker,
9, N. A. Powers,	20, E. Y. Mallow,
10, T. A. Clay,	21, —— ——,
11, R. A. Johnston,	22, —— ——,
12, P. W. Stubbs,	23, —— ——,

in the name and behalf of the citizens of Georgia charge and accuse and specially present Tom Allen, of the county and State aforesaid, with the offense of murder; for that the said Tom Allen, on the 13th day of September, in the year eighteen hundred and ninety-four, in the county aforesaid, did then and there unlawfully and with force and arms, with a pistol, the same being a weapon likely to produce death, in and upon Charles Carr did unlawfully, wilfully, feloniously, and of his malice aforethought make an assault, and him, said Charles Carr, the said Tom Allen did with said pistol unlawfully, wilfully, feloniously, and of his malice aforethought shoot, thereby giving to said Charles Carr a mortal wound, of which wound said Charles Carr, after lingering till the 14th day of September, 1894, then and there died; and so the jurors aforesaid upon their oaths aforesaid do say that him, said Charles Carr, he, said

Tom Allen, did in the manner and by the means aforesaid unlawfully, wilfully, feloniously, and of his malice aforethought kill and murder, contrary to the laws of said State, the good order, peace, and dignity thereof.

31 Bibb superior court, November term, 1894.

W. H. FELTON, JR., *Sol. Gen.*

Special presentment.

The defendant, Thomas Allen, formally arraigned and pleads not guilty.

W. H. FELTON, JR., *Sol. Gen.*

Copy of bill of indictment and list of witnesses sworn before the grand jury waived before arraignment.

J. W. PRESTON,
JAMES H. BLOUNT, JR.,
WALTER GRACE,
Defendant's Attorneys.

We, the jury, find the defendant guilty.

W. A. JOHNSTON, *Foreman.*

32 *Charge of the Court.*

GENTLEMEN OF THE JURY: In this case you are the judges of both the law and of the facts. That does not mean that you are authorized to legislate for the benefit of either the State or the defendant in this particular case, nor does it mean that you are to create in your minds any facts to apply to any law that you may believe ought to be given in charge or which may be given you in charge. It means that you are to take the law from the judge who is the part of the court responsible for the law; that you are to take the facts from the witnesses as they have testified to them from the stand, and then let your verdict, after applying those facts to the law, speak what you believe to be the truth of this case.

The defendant is presumed to be innocent until he is proven guilty. That presumption is not to be seized upon by the jury in order to acquit a man who is really guilty of crime, nor is that remark to be construed by you to mean that you are authorized or required to convict any man who is really innocent of crime. The presumption of innocence *with* the law clothes all defendants who come before the court- of the country is a safeguard which is thrown around the person of the citizen, in order that, so far as the machinery of the law can prevent it, no innocent man shall ever be convicted of crime; and it is therefore necessary, before you can convict in this or in any criminal case, that the State should make out its case by proof satisfactory to your minds and to a reasonable and moral certainty. A reasonable and moral certainty is not a mathematical certainty. It is a very easy matter to demonstrate to a mathematical certainty, or, in other words, an absolute certainty that 2 and 2 make 4. That can be demonstrated so as to leave no

shadow of doubt as to its truth, but nothing which depends upon human testimony, no proposition which depends upon human evidence to support it, can be demonstrated to a mathematical certainty, and therefore all that the law requires of you in criminal cases is that you be convinced to a reasonable and moral certainty
33 and beyond a reasonable doubt.

A reasonable doubt, to my mind, cannot be any plainer than by the words themselves that are used to express it. It is the doubt of a reasonable, sensible man. It is a doubt that must have some reason for it. You are not authorized to go outside of the evidence to hunt up a doubt, nor are you authorized to hunt for a doubt anywhere. The doubt must hunt you up. It must seize upon your minds. It must arise of itself, and must arise out of the evidence or lack of evidence in the case; and if, after you have fairly, honestly, and dispassionately considered all the evidence that has been offered to you, your minds are uncertain and wavering and you don't know who is right and who is wrong about the contention, the law says that you entertain a reasonable doubt, and that you ought to give the benefit of that doubt to the defendant and acquit him.

It is your duty to reconcile all of the evidence submitted in the case, or, rather, to endeavor to reconcile all of the evidence submitted in the case. You are to proceed upon the idea that all the witnesses who have testified have intended and attempted to speak the truth; and if you can reach a reasonable conclusion in this case by making all the witnesses who have testified speak the truth, that conclusion ought to be your verdict, provided that in the event it is guilty you are satisfied of it beyond a reasonable doubt.

If it is impossible for you to reconcile the evidence so as to make all the witnesses who have testified speak the truth, then it becomes your duty to pass upon the credibility of the witnesses who have testified, to weigh the testimony of the witnesses; and in weighing the witnesses who have testified before you, you ought to look to his demeanor, his appearance upon the stand, his relationship, either to the defendant or to the deceased, his interest in the result of the trial, his apparent intelligence or his apparent ignorance, the apparent consistency or inconsistency of his statement, and apparent reasonableness or unreasonableness of what he may say.
34 The credibility of a witness as a usual thing depends upon two things: his ability to know the truth and his disposition to tell the truth; and this is always a good test to apply to the evidence that is submitted to the jury: First, inquire as to the ability of the witness to know what he is testifying about, and, second, his disposition to tell the truth about what he is testifying about; and in arriving at a conclusion as to the disposition of the witness to tell the truth about what he does know, you ought to apply all the rules I have given you.

A crime or misdemeanor shall consist in the violation of a public law, in the commission of which there shall be a joint operation of act and intention or criminal negligence. Intention will be manifested by the circumstances connected with the perpetration of the

offense and the sound mind and discretion of the accused. I have read you the definition of a crime and also the method of arriving at the intention of the party who is charged with having committed a crime.

Murder is the unlawful killing of a human being in the peace of the State by a person of sound memory and discretion, with malice aforethought, either expressed or implied.

Involuntary manslaughter shall consist in the killing of a human being without intention to do so, but in the commission of an unlawful act or lawful act which probably might produce such a consequence in an unlawful manner, provided always that where such an involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a riotous intent, or of a crime punishable by death or confinement in the penitentiary, the offense shall be deemed and adjudged to be murder.

Now, gentlemen of the jury, keeping in mind the definitions I have just given you, you will proceed to inquire into the facts and apply them to the law, as I shall give it to you in charge, and make up a verdict which shall speak what you believe to be the truth in this case. You will notice that in the definition of murder the deceased must be a human being in the peace of the State. That does not mean that he must be at peace with all mankind; that does not mean that he must be in the condition of a person who is not violating the law, but in the peace of the State, not in rebellion against the State—a person who is not at war with the State—and whether he be convicted of or is actually in the commission of some misdemeanor at the time, unless he is at actual war with the State, he is in the peace of the State.

You will notice from the definition that the person doing the killing must be a person of sound memory and discretion—that is to say, the slayer must be of sound mind, legally responsible for his acts. The law presumes every person to be sane and responsible for his acts until the contrary is shown by evidence, and when a defendant sets up insanity as a defense in order either to justify or mitigate the offense charged, before the defense can avail the jury ought to believe from the evidence that at the time of the commission of the crime the mind of the accused was so far affected with insanity as to render him incapable of distinguishing between right and wrong in respect of the killing; or, if he was conscious of the act he was doing and knew its consequences, that he was, in consequence of his insanity, wrought up to a frenzy which rendered him unable to control his acts or direct his movements.

Drunkenness shall not be an excuse for any crime or misdemeanor unless such drunkenness was caused by fraud, artifice, or contrivance of other person or persons for the purpose of having a crime perpetrated, and then the person or persons so causing such drunkenness for such malignant purpose shall be considered a principal and suffer the same punishment as would be inflicted on the

person or persons committing the offense, if he, she, or they had been possessed of sound reason and discretion.

I instruct you that voluntary drunkenness is no excuse for
36 crime committed under its influence, nor is any state of mind resulting from drunkenness, short of actual insanity or loss of reason, any excuse for crime. If a person is sober enough to intend to shoot at another and actually does shoot at and hit him and kill him without justification therefor, then the law presumes such person is sober enough to form the specific intention to kill the person shot at, and in such case he is criminally responsible for his act.

If the accused who is on trial killed Carr while drunk and in consequence of his drunkenness did not comprehend the nature of the act, he would be responsible for it under the law if the drunkenness produced a temporary frenzy, madness, or unsoundness of mind in the defendant. He would not be excused or held irresponsible for the act done by him while laboring under such temporary insanity, madness, or unsoundness of mind thus produced, it being his voluntary act, and unless there are other circumstances surrounding the act to reduce the crime, the killing under such circumstances would be murder; but if the madness, insanity, or unsoundness of mind, although produced by drunkenness, be permanent and fixed, so as to destroy all knowledge of right and wrong, then the person thus laboring under these infirmities would not be responsible, and in that case it would be your duty to acquit him.

You will notice also that malice, either expressed or implied, is a necessary ingredient of the crime of murder.

Expressed malice is that deliberate intention to take away the life of a fellow-creature which is manifested by external circumstances capable of proof.

Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart.

Now, don't get the idea from this that there is more than one kind of malice, except as to the manner in which it displays itself.

Legal malice is the same thing wherever found, whether it
37 be expressed or implied. Malice, in the meaning of the law, includes not only anger, hatred, and revenge, but every other unlawful and unjustifiable motive. Malice is not confined to ill-will towards any individual, but it is intended to denote any wicked or corrupt motive. A thing done with a wicked mind and attended with such circumstances as plainly indicate a heart regardless of social duty and fully bent of mischief indicates malice within the meaning of the law. Hence malice is implied from any cool and deliberate act against another, however sudden, which shows an abandoned and malignant heart.

If the defendant in this case, being of sound memory and discretion, shot Carr with a pistol without such provocation as is apparently sufficient to justify an irresistible passion, and from that pistol-shot the deceased died, although the defendant had no previous ill-will or malice against the deceased, yet, without proof of other facts sufficient to excuse the defendant in some degree, he is

presumed to have had malice at the moment of the shooting, and such killing is murder, whether he was drunk or sober.

To constitute malice aforethought under the law no particular time need intervene between the formation of the intention to kill and the killing. It may be but a moment, measured by time, but it is sufficient if the intent to commit the act with a full appreciation of the result of the act was present at the time of the killing, or if the person doing the killing puts himself in the position not to be able to have a full appreciation of the result of the act.

Malice is always implied in law from any wilful and criminal act, unless the evidence shows that the defendant was acting from some innocent and proper motive.

While the law does not excuse a person from a crime committed while intoxicated, if that intoxication was voluntary, the law yet allows evidence of intoxication and other conduct of the defendant on trial for the purpose of explaining the transaction, and to show the absence of motive of to show accident or other
38 cause for the homicide except that of mere voluntary drunkenness, and such evidence is allowed for this purpose only, for if nothing else appears except the mere fact that the defendant was drunk he will be held responsible just as if, and in the same manner and to the same extent as if, he was a man of sound mind. If, therefore, the evidence satisfies your minds that the defendant was simply drunk, and that he without provocation shot and killed Charles Carr, as charged in the indictment, he would be guilty of murder; but if you shall find that this defendant had borne a previous good character, that he had not known Carr previously, that he was so drunk that he was unconscious of what he was doing at the time, that he had a pistol in his hand for some time previous to the killing, while he was yet taking drinks and talking in a friendly manner to the deceased and others and nothing occurred or was done by the deceased to provoke anger, you may consider all of these facts in determining whether the shot which killed the deceased was accidental, and if you should have any reasonable doubt upon that point you could not find him guilty of murder.

The court charges you that, finding the shot accidental, you will further inquire whether the circumstances show that, notwithstanding the fact that the shooting was accidental, he is yet guilty under the law of some lesser grade of homicide. You will, therefore, further inquire whether or not, though accidental, the defendant so negligently contributed to said accident as to be held criminally responsible for the accident. If in doing this you find that the defendant wilfully or carelessly pointed his pistol at deceased, and that the pistol fired without any intention on the part of the defendant to pull the trigger and shoot, the court charges you that such negligence would not excuse the defendant if, from the manner the evidence shows that it was done, it had a tendency to produce death, and that such act or careless handling of the pistol was in itself an unlawful act, and the law would hold the killing to be murder, and you would be authorized to so find.

39 I charge you, gentlemen of the jury, in this connection, that to point a pistol wilfully and intentionally at another, whether in play or earnest, is an unlawful act, and if you believe from the evidence in this case that this defendant intentionally pointed a pistol at the deceased, and if you believe further that that act of itself was one which naturally tended in its consequences to take the life of a human being, you would not be authorized to find a verdict of involuntary manslaughter, but the law would require you to find the defendant guilty of murder. If you should find that the deceased was not acting in an unlawful manner at the time, and that the killing occurred by an unfortunate accident, or that he was acting in a lawful manner, without due caution and circumspection, he would then be guilty of involuntary manslaughter, in the commission of an unlawful act without due caution and circumspection.

If you believe from the evidence that the killing was the result of a pure accident, without the unlawful act of the defendant or without the lawful act of the defendant without due caution and circumspection, you could not find him guilty of any offense, or, if you have a reasonable doubt upon these points, you would not be authorized to convict him, but attribute it to misfortune or accident, and you should acquit him. The court further charges you here that to have a pistol out in a bar-room without efforts to use it offensively or defensively is neither a crime or an unlawful act.

I charge you further that furnishing whiskey to a drunken man is not of itself such contribution as the law contemplates in order to make the party who furnishes the whiskey equally responsible with the party who commits the crime.

A prisoner shall not be found guilty of any crime or misdemeanor committed by misfortune or accident when it satisfactorily appears there was no evil design or intention or culpable neglect, and I charge you that while drunkenness is no excuse for crime, yet it may be considered as to whether the prisoner intended to commit the act or did it through misfortune or accident. If the defendant actually killed Carr through misfortune or accident, and it
40 satisfactorily appears to you there was no evil design or intention or culpable neglect on the part of the defendant, then you ought not to convict him of murder, but you ought to acquit him.

The defendant has a right to make a statement to you, and you are to give it just such weight as you believe it to be entitled to. It is not under oath, and he is not subject to cross-examination. You take it, and take it for what you believe it to be worth. You may believe it in preference to the sworn testimony if you see fit to do so. You may believe a part of it; you may believe all of it; it is entirely with you. It is for you to take it and say what it is worth yourself, without any further instructions from the court whatever.

The defendant has a right to put his character for peace and quiet in a case of this sort in issue, and when it is put in issue by the defendant it is the duty of the jury to look to the evidence upon those questions in order, not to say whether or not the defendant is guilty,

but to determine what was the intention of the defendant at the time the act was committed. I say that he has a right to put that in evidence. You take it, both for and against him, as it may appear from the evidence of the witnesses.

Now, gentlemen of the jury, take this case and first determine whether this act was committed by misfortune or by accident. If committed by misfortune or accident, and there was no intention and no culpable neglect and no evil design upon the part of the defendant, he is not guilty, and it would be your duty to so find.

If he killed the deceased by accident, in the commission of a lawful act, without due caution and circumspection, then you ought to find him guilty of involuntary manslaughter. If he killed the deceased accidentally, in the commission of an unlawful act, then involuntary manslaughter ought to be your verdict, unless you believe that the unlawful act tended in its consequences naturally to take the life of a human being, in which case your verdict ought to be murder. If he was sane and the act was done with malice
41 aforethought, as I have instructed you, your verdict ought to be guilty.

If the defendant was voluntarily drunk and otherwise of sound mind, knowing right from wrong, and he killed the deceased without any provocation, your verdict ought to be guilty.

In case you find the defendant guilty, gentlemen of the jury, you have a right, without any reason on earth or without any suggestion from me or anybody else, to recommend that he be imprisoned in the penitentiary for life. It is entirely with you. If you make that recommendation it will be the duty of the court to enforce it.

In case you find the defendant guilty, that means that the death penalty will be inflicted upon him. In case you find the defendant guilty without recommendation you say, "We, the jury, find the defendant guilty," and that would mean death.

In case you recommend that he be imprisoned for life your verdict will be, "We, the jury, find the defendant guilty, and recommend that he be imprisoned in the penitentiary for life;" that would mean his imprisonment in the penitentiary for life.

In case you find the defendant guilty of involuntary manslaughter in the commission of an unlawful act your verdict would be, "We, the jury, find the defendant guilty of involuntary manslaughter in the commission of an unlawful act."

In case you find the defendant guilty of involuntary manslaughter without due caution and circumspection you say, We, the jury, find the defendant guilty of involuntary manslaughter in the commission of a lawful act without due caution and circumspection.

In case you find the defendant not guilty your verdict will be, "We, the jury, find the defendant not guilty."

You may retire.

Approved and ordered filed July 5th, 1895.

J. M. GRIGGS,
J. S. C., P. C.

Filed in office Dec. 17th, 1894.

ROB'T A. NISBET, *Clerk.*

42 THE STATE *vs.* TOM ALLEN. } Indictment for Murder in Bibb Superior Court, November Term, 1894. Verdict of Guilty, November 28th, 1894.

And now comes the defendant in the above-stated case, Thomas Allen, during the regular term of the court before the adjournment thereof and within thirty days from the rendition of said verdict, to wit, on this the — day of December, 1894, and, being dissatisfied with said verdict, moves the court that the State's counsel show cause instanter, or as soon as counsel may be heard, why said verdict should not be set aside and a new trial awarded and granted him in the premises upon the following grounds, to wit:

1st. Because the verdict of the jury is contrary to law.

2nd. Because the verdict of the jury is contrary to the law and the evidence and strongly and decidedly against the weight of the evidence.

3rd. Because the verdict of the jury is without evidence sufficient to support the finding of the jury and against the principles of justice.

4th. Because the jurors sworn to try the case and who did try it were not impartial jurors, but were biased and prejudiced against this defendant, and did not therefore render a true and impartial verdict, to wit, James M. Earp, one of the jurors, had formed and expressed an opinion of the guilt of the defendant before his qualification as a juror, and had expressed his opinion in such a manner as to show his bias and prejudice against the defendant and his partiality to the State in this, to wit, that about one week after the killing of Charlie Carr, in the presence of E. W. Pickett, J. M. Herndon, and others, in a conversation in which he used bitterly unfriendly language against the defendant, amongst other things, then and there used and uttered the following language, to wit: "If I get on the jury I'll be damned if I don't hang him," which said
43 language was not known to or communicated to this defendant or to any of his counsel before the said Earp was sworn as a juror in said case.

And further, to wit, W. A. Johnston, another of the jurors who tried said case, on Monday, the 26th of November, 1894, after the case had been called and continued over until Tuesday, the 27th of November, the next day, to await the arrival of an absent witness for the defendant, and after he, the said Johnston, had been summoned as a juror, stated to R. L. Smith, in the presence of J. D. Grace, that in regard to this case, referring to the case of the State against this defendant, "In the Amerson case I don't know so much about it, but I think there will be some neck-stretching in the Allen case."

5th. Because the court erred in sustaining the State's objection to the following question asked by defendant's counsel of Wyley Allen, a witness for the defendant: "State to the jury in your own way the peculiarities of his mind when Tom is sober as compared with his mind when he is drinking. First compare his mind with ordinary people and state the difference between it and any other ordinary

mind when he is sober and when he is drinking," the object of said question being to show weakness of mind in the defendant and peculiar acts; that he was capricious and boyish when sober; that he had hallucinations and false imaginings when sober, and to get details of such acts.

6th. Because the court erred in sustaining the State's objection to the following question asked by defendant's counsel of Wyley Allen and holding the same irrelevant: "State to the jury from your observation when your brother Tom is under the influence of intoxicants what his condition of mind is, whether he had sense or no sense," the object of said question being similar to the object of the question set out in the 5th ground of this motion, but, further, to show that the defendant's mind when sober, being weak and unsound, was absolutely and easily dethroned with liquor.

7th. Because with no dialogue relative to the particular
44 subject except the following:

Mr. PRESTON: I will ask you if you know anything about the character of mind, if he has any evidence of weakness of the mind; if so, state them.

WYLEY ALLEN: I can only tell you the way he acts when he gets tight.

Mr. PRESTON: If the court will permit it for the purpose of showing weakness of mind, I will ask it in this form.

The COURT: You had better ask him what his condition of mind is when he is drunk.

Mr. PRESTON: When he is not drunk?

The COURT: The witness says he don't know only when he is tight.

Witness ALLEN: I say his mind is not right when he is tight.

The COURT: Don't consider that, gentlemen of the jury. You may inquire into the condition or this defendant's mind ordinarily.

Mr. PRESTON: What is the condition of this man's mind when he is sober? What is the condition of his mind in four or 5 years?

Answer: It is not good; of course, it is worse at times than it is at others.

* * * And directly after this dialogue the court prevented the said witness from answering the following question: "What is the character of mind of Thomas Allen when he is sober, whether it is a good mind or a weak mind?" For as soon as said question was asked the court said, "He has already answered that." Said question was asked for the purpose of showing mental deficiency on the part of the defendant when sober, and the ground not having been up to that time covered by any other question that had been asked.

8th. Because the court erred in sustaining objection to the following question, asked of Wyley Allen, on the ground that the same was irrelevant: "I will ask you if he (defendant) has any pe-

culiarities or weakness of mind; if so, if you know them, please state them."

9th. Because the court erred in sustaining objection to the following question, asked of Wyley Allen, on the ground that the same was irrelevant: "I will ask you whether or not your brother has any physical or other weakness or other injuries from which he may have suffered mentally; if so, state them."

10th. Because the court erred in sustaining objection to the following question, asked of F. F. Walker, on the ground that the same was irrelevant: "I will ask you if he (defendant) had the same characteristic of soundness of mind that ordinary people have when sober."

(*Note by the Court to the 5th, 6th, 7th, 8th, 9th, and 10th Grounds of the Motion.*

The questions set out in the various grounds of the motion just stated and the connection in which they came in the testimony of Wyley Allen can only be properly understood by reference to the stenographic report which contains the questions asked, the rulings of the court, and the statements of counsel; which stenographic report is appen-ed as a note by the court to the grounds for the purpose of showing the rulings of the court, the evidence introduced, and the statements of counsel with reference to the evidence, the stenographic report being necessary to a clear understanding of the questions and answers, as well as the position of counsel and the rulings of the court. Defendant's counsel announced several times during the progress of the trial that insanity was not proposed to be set up as a defence; that insanity could not be proven, and that defendant's counsel did not propose to attempt it.

J. M. GRIGGS, *J. S. C.*)

"WYLEY ALLEN sworn:

Mr. PRESTON: Is Dr. Fuller related to any of your family?

A. No, sir.

Q. Tom here is a brother of yours?

A. Yes, sir.

Q. State to the jury in your own way the peculiarities of his mind when Tom is sober as compared with his mind when he is drinking. First, compare his mind with ordinary people and state the difference between it and other ordinary mind- when he is sober and when he is drinking.

(Objection as illegal. Sustained.)

Q. What was the general disposition of your brother Tom when he was sober?

A. He was good-natured, and he had as many fusses when he was sober, I think, as he did when he was drinking. I never knew him to have any fusses but once or twice, and a fellow or two run

on him and he tried to defend himself, and I know several times I have remarked to several——

(Objection as illegal.)

Q. What is his general disposition, if you know it, for peacefulness and quiet when he is sober?

A. I don't think that there was ever any man that had a better disposition than he.

(Objection as not the question. Sustained.)

Q. Do you know what his general reputation was in the neighborhood?

A. Yes, sir.

Q. For peace and quiet, was it good or bad?

A. It was good.

Q. I will ask you if there was any difference in his conduct when he was under the influence of intoxicants from other people; and, if so, state that.

(Objection as illegal, as he had a right to prove the insanity of the defendant, but what this man's state of mind is when he is drunk is not an issuable question or fact in the case.)

Mr. PRESTON: I do not want to prove his insanity. When he was under the influence of liquor—that is, deeply drunk—I ask you to state what his condition of mind is.

The COURT: You withdraw the other question?

Mr. PRESTON: Yes, sir. State to the jury from your observation when your brother Tom is under the influence of intoxicants what his condition of mind is, whether he has sense or no sense.

(Objection. Sustained.)

47 Q. Have you ever seen Tom Allen drunk?

A. Yes, sir.

Q. State whether, at the time you saw him drunk, whether or not he had any sense.

(Objection on the same ground. Sustained.)

Q. I will ask you if you know anything about the character of mind—if he has any evidence of weakness of mind; if so, state them.

A. I can only tell you the way he acts when he gets tight.

Q. If the court will permit it, for the purpose of showing weakness of mind, I will ask it in that form.

The COURT: You had better ask him what his condition of mind is when he is drunk.

Mr. PRESTON: When he is not drunk?

The COURT: The witness says he don't know only when he is tight.

WITNESS: I say his mind is not right when he is tight.

The COURT: Don't consider that, gentlemen of the jury. You may inquire into the condition of this defendant's mind ordinarily.

Mr. PRESTON: What is the condition of this man's mind when he is sober? What is the condition of his mind in 4 or 5 years?

A. It is not good; of course, it is worse at times than it is at others.

Q. What is the character of mind of Thomas Allen when he is sober—whether it is a good mind or weak mind?

The COURT: He has already answered that.

Mr. PRESTON: Now, I ask you, for the purpose of enabling this jury to say whether he has any hallucinations, whether or not he has any peculiarities that ordinary men haven't; and, if so, to state them.

A. He does.

(Objection as not a material issue in the case. Sustained.)

The COURT: I will let you ask him if this man has hallucinations; and, if so, what they are. The court does not hold you cannot prove this man's insanity or that you cannot offer evi-
48 dence of it. I have simply ruled on the questions as you have put them, and that is all that I can do.

Mr. PRESTON: I will ask you if he has any peculiarities or weakness of mind. If so, if you know them, please state them.

(Objection on same ground. Sustained.)

Q. I will ask you whether or not your brother has any physical or other weakness or other injuries from which he may have suffered mentally; if so, state them.

(Objection on same ground. Sustained.)"

11th. Because the court erred in rejecting the testimony of Wyley Allen, one of the witnesses for the defendant, as appears from the following colloquy between counsel for the defendant, the State, the court, and witness. The defendant's counsel, offering the said witness to prove the weakness of mind of the defendant and specify acts, then stated to the court, substantially, to wit, that he was maudling, capricious, boyish; that he showed weakness by oversympathy, would weep like a child about matters that ordinary men would not; placed no value on money, would spend it without equivalent; that he had false imaginings and hallucinations, at one time, a few months before the homicide, at church, coming from the spring, stating that he had killed two negroes down there, which was not a fact; that when he was drunk he was crazy absolutely; that liquor affected him differently from other people; that he had been injured by a severe wound on the back of his neck which affected his mind and constitution—said testimony being offered, as distinctly stated to the court, not to establish insanity, but that the jury might consider the same either for the purpose of enabling the jury to determine whether the killing was the result of accident or carelessness or in the mitigation of the punishment, and to show absence of motive or malice.

(*Note by the Court to the Eleventh Ground of the Motion.*)

"With reference to this ground the court ruled: 'I will let you ask him if this man has hallucinations, and, if so, what they
49 are. The court does not hold you cannot prove this man's insanity or that you cannot offer evidence of it. I have simply ruled on the questions as you have put them, and that is all that I can do.'

The 11th ground is approved in so far only as it conforms to this note by the court.

J. M. GRIGGS, *J. S. C.*"

12th. Because the court erred in instructing the jury in the following language:

"You are not authorized to go outside of the evidence to hunt up a doubt, nor are you authorized to hunt for a doubt anywhere. The doubt must hunt you up. It must seize upon your minds. It must arise of itself and must arise out of the evidence or lack of evidence in the case."

13th. Because the court erred in instructing the jury in the following language:

"If the accused, who is on trial, killed Carr while drunk and in consequence of his drunkenness did not comprehend the nature of the act he would be responsible for it under the law if the drunkenness produced a temporary frenzy, madness, or unsoundness of mind in the defendant. He would not be excused or held irresponsible for the act done by him while laboring under such temporary insanity, madness, or unsoundness of mind thus produced, it being his voluntary act; and unless there are other circumstances surrounding the act to reduce the crime, the killing under such circumstances would be murder."

14th. Because the court erred in instructing the jury in the following language:

"I charge you, gentlemen of the jury, in this connection that to point a pistol wilfully and intentionally at another, whether in play or in earnest, is an unlawful act. and if you believe from the evidence in this case that this defendant intentionally pointed a pistol at the deceased, and if you believe further that that act of itself was one that naturally tended in its consequences to take the life
50 of a human being, you would not be authorized to find a verdict of involuntary manslaughter, but the law would require you to find the defendant guilty of murder."

15th. Because the court erred in instructing the jury in the following language:

"I charge you further that furnishing whiskey to a drunken man is not of itself such contribution as the law contemplates in order to make the party who furnishes the whiskey equally responsible with the party who commits the crime."

The defendant says that inasmuch as the court said nothing else to the jury upon this subject that the court did so withdraw from the jury the fact that the deceased did so furnish whiskey to the

defendant while drunk, so as to prevent the jury from considering such fact in passing upon the question whether they should find a plain verdict of guilty or recommend penitentiary imprisonment for life. Defendant's counsel having insisted in their argument before the jury upon the consideration of such fact for such purpose and having requested the court to instruct the jury upon the subject as follows:

"The court will further charge you upon the question of contribution to the accident, if it be an accident, that you may consider also the acts of the deceased, whether or not he contributed to the accident by selling liquor to the defendant, and thereby rendering him less careful with the pistol;" which request the court refused.

16th. Because the court erred in instructing the jury in the following language:

"The defendant has a right to put his character for peace and quiet in a case of this sort in issue, and when it is put in issue by the defendant it is the duty of the jury to look to the evidence upon this question, in order not to say whether or not the defendant is guilty, but to determine what was the intention of the defendant at the time the act was committed."

51 (*Note by the Court to the 16th Ground of the Motion.*)

"It was admitted that the defendant fired the shot that killed Carr.

J. M. GRIGGS, *J. S. C.*"

17th. Because the court erred in instructing the jury in the following language:

"If he killed the deceased accidentally in the commission of an unlawful act, then involuntary manslaughter ought to be your verdict, unless you believe that the unlawful act tended in its consequences naturally to take away the life of a human being, in which case your verdict ought to be murder."

18th. Because the court erred in instructing the jury in the following language:

"In case you find the defendant guilty, gentlemen of the jury, you have a right, without any reason on earth or without any suggestions by me or anybody else, to recommend that he be imprisoned in the penitentiary for life. It is entirely with you. If you make that recommendation, it will be the duty of the court to enforce it."

The defendant says that this was that the court said to the jury, and he complains that the court in this instruction submitted this question to the jury as one upon which they might act arbitrarily and not otherwise; that such instruction in effect prevented the jury from rationally considering all of the evidence in the case with reference to this question, and said instruction assumed, in effect, that there were no facts or reasons for the jury to consider any act upon — making such recommendation.

19th. Because the court refused to charge, when requested to do — under the rule in writing, the following:

"The court will further charge you upon the question of contribution to the accident, if it be an accident, that you may consider also the acts of the deceased—whether or not he contributed to the accident by selling liquor to the defendant, and thereby rendering him less careful with the pistol."

52

J. W. PRESTON.
GUSTIN, GUERRY & HALL.
J. W. BLOUNT, JR.
WALTER GRACE.

Filed in office December 22nd, 1894.

ROB'T A. NISBET, *Clerk.*

Due and legal service of the within motion acknowledged and copy waived.

W. H. FELTON, JR., *Sol. Gen.*

53

MACON, GA., *December 22nd*, 1894.

This motion for new trial having been filed together with the brief of the evidence in the case, and counsel for the State not being able to agree upon said brief, and the motion not being ready for a hearing, it is ordered that the hearing be set down for Saturday, the 5th day of January, 1895, and that movant- have until then to perfect their motion and brief of evidence.

Ordered, further, that a supersedias be, and the same is hereby, ordered and granted until the final determination of the case.

J. M. GRIGGS,
J. S. C., P. S.

JANUARY 3RD, 1895.

Ordered that the argument on this motion for a new trial be, and the same is hereby, continued over until 4 p. m., January 7th, 1895, at which time it will be resumed.

J. M. GRIGGS, *J. S. C.*

DAWSON, GEORGIA, *Jan'y 23rd*, 1895.

This motion having come on to be heard before me, at Macon, Ga., on Jan'y 5th inst., and the hearing thereof having been then continued to the 7th of January inst., after hearing argument thereon, my decision was held up until today. After considering the same, it is ordered that the motion be overruled on each and all of the grounds thereof. The recitals of fact contained in said ground as modified by the court are true.

J. M. GRIGGS,
J. S. C., P. C.

54 STATE OF GEORGIA, }
Bibb County. }

Before me in person comes E. W. Pickett, who, being duly sworn, deposes and says that he is personally acquainted with James Earp, one of the jurors who tried Thomas Allen in Bibb superior court

on the 27th and 28th of the present month (November); that he was in the city of Macon, at the store of John Green, in East Macon, one evening a short time after the killing of Charles Carr by Thomas Allen, and saw the said James Earp in said store. Deponent says conversation arose about the killing and the case, and that in said conversation between himself, deponent, and others who were then and there present, deponent remembering Willie Green and James Blackshier, the said Earp was speaking and took sides against Thomas Allen, and then and there, amongst other things, stated positively and unqualifiedly that if he was on the jury which was to try the case he would hang Thomas Allen. Deponent is in no way related or connected with Thomas Allen nor any of his family and he has no kind of interest in the case.

E. W. PICKETT.

Sworn to and subscribed before me this the 29th day of November, 1894.

MATT. R. FREEMAN,
Not. Pub., Bibb Co., Ga.

55 STATE OF GEORGIA, }
Bibb County. }

Before me in person comes James M. Herndon, who, being duly sworn, deposes and says that about one week after the killing of Charles Carr by Thomas Allen, who was tried and convicted of murder in Bibb superior court *in* the 29th instant, deponent was at the store of John Green, in East Macon, and just after he had eat supper and in the presence of other gentlemen, whose names he cannot give, he heard James Earp, one of the jurors who tried said Thomas Allen and convicted him, say and use the following language in reference to Thomas Allen, to wit: "If I was on the jury I'll be damned if I would not hang him." This was stated in a conversation between the said James M. Earp, deponent, and others. Deponent never mentioned what he thus heard until on the 29th of this month, that he remembers, and it had passed out of his mind until he happened to be in the court-room and saw Earp on the jury. He then remembered what he had stated, and this much exactly what he stated, and other language he cannot quote, unfriendly to Thomas Allen.

J. M. HERNDON.

Sworn to and subscribed before me this the 30th day of November, 1894.

J. B. ANDREWS, *J. P.*

56 GEORGIA, }
Bibb County. }

Personally comes R. L. Smith, who, sworn, says he knows W. A. Johnston, who was a member of the jury which tried Tom Allen for murder and rendered its verdict Nov. 28th, 1894. Deponent saw Johnston on Monday morning, November 26th, 1894, the said Johnston being in attendance on the court as a juror. At about

ten minutes before eleven o'clock on said Monday the court took a recess for twenty-five (25) minutes, until eleven fifteen (11.15). During the recess the following conversation occurred between said W. A. Johnston and deponent: Deponent said, "Well, Mr. Johnston, what do you think of the Amerson case, and what do you think of the Allen case?" Said Johnston answered, "I don't think much of the Amerson case, but I think there will be some neck-stretching in the Allen case." Deponent further says that he did not before the trial communicate this to any one, because he never thought anything more of the conversation until he heard said Johnston make oath that there was no bias or prejudice on his mind either for or against Tom Allen, and qualified as a juror. Deponent further says that he did not tell this to anybody in any way connected with the representation either of the defense or the prosecution until Thursday evening, Nov. 29th, when he communicated same to counsel for defendant.

R. L. SMITH.

Sworn to and subscribed before me this November 30th, 1894.

J. H. L. GERDINE,
J. P., Bibb Co., Ga.

57 GEORGIA, }
Bibb County. }

Personally comes J. D. Grace, who, sworn, says that he has read the foregoing affidavit of R. L. Smith; that he heard the conversation therein mentioned between W. A. Johnston and R. L. Smith; that the conversation was exactly as stated and during the recess of court on Monday, November 26th, 1894, as stated. Deponent says that he, like said Smith, did not mention said conversation to any one before the trial, and did not think of it until he heard said Johnston qualify as a juror in the Allen case. Deponent further says that he did not communicate the matters herein stated to any one connected with the case until Thursday evening, Nov. 29th, he communicated the information herein given to counsel for defendant Allen.

J. D. GRACE.

Sworn to and subscribed before me this November 30th, 1894.

J. H. L. GERDINE,
N. P., ex Off. J. P., Bibb Co., Ga.

GEORGIA, }
Bibb County. }

Personally comes J. W. Preston, W. J. Grace, and J. H. Blount, Jr., each of whom, being sworn, says—

That nothing affecting the competency or impartiality either of James M. Earp, W. A. Johnston, or of any member of the jury before which deponent acted as counsel for Tom Allen in his trial for the killing of Charles Carr was known to or suspected by him until

after the rendition of said verdict. Deponents constituted all the defendant's counsel.

J. W. PRESTON.
W. J. GRACE.
JAMES H. BLOUNT, JR.

Sworn to and subscribed before me this January 5th, 1895.
J. M. GRIGGS,
J. S. C., P. C.

58 STATE OF GEORGIA, }
Bibb County. }

In person came before me Thomas Allen, who, being duly sworn, deposes and says that at the time and before one James Earp and W. A. Johnston, two of the jurors, were selected and sworn to try the case of the State *vs.* himself for murder he was ignorant of any matter or thing that would disqualify them or either of them as jurors in his case. Being unacquainted with them, he had no means of ascertaining their fitness except the usual legal procedure. He was therefore wholly ignorant of any statements made by them or either of them in relation to himself or his case until after he was convicted, and then he was informed of the statements alleged by affidavits of others that they had made prejudice to his case, to wit, the statement alleged to have been made by James Earp that "if he got on the jury he would hang Tom Allen," and the statement of W. A. Johnston that in Allen's case, meaning this deponent, there would be neck-stretching.

T. F. ALLEN.

Sworn to and subscribed before me this the 5th of Jan'y, 1895.
NAT. BIRDSONG,
Not. Pub., Bibb Co., Ga.

59 GEORGIA, }
Bibb County. }

Before me, an officer authorized by law to administer oaths in and for said county, comes Albert Jones, who, sworn, says he is tax-collector of Bibb county; that he is captain of the Macon Light Infantry; that he knows personally R. L. Smith and J. D. Grace; that they are both members of said military company; that he knows their general character, that it is good, and that from that knowledge he would not hesitate to believe them on oath.

ALBERT JONES.

Sworn to and subscribed before me this January 5th, 1895.
J. M. GRIGGS, *J. S. C.*

60 GEORGIA, }
Bibb County. }

Before me personally comes James M. Earp, who, being duly sworn, deposes and says that the statement made by E. W. Pickett in a certain affidavit, signed the 29th of November, 1894, before M. R. Freeman, notary public, in which this expression occurs, "That if

he (meaning Earp) was on the jury which was to try the case he would hang Thomas Allen," is untrue; that he made no such statement at all in Pickett's presence, or in the presence of any one else; that as a matter of fact he had no bias or prejudice against the defendant, and that his mind was perfectly impartial with reference to the case, and that he had never heard any of the evidence under oath, and does not even remember having read the account of the killing in the newspapers, and knew nothing whatever of the circumstances attending the killing, and that if he ever at any time remarked or commented upon this case at all it was a mere idle conversation among friends, as he certainly had no fixed opinion about the case either way, and certainly had no prejudice or bias against the defendant, Thomas Allen.

With reference to the facts stated in the affidavit of J. M. Herndon, signed the 30th day of November, 1894, before J. B. Andrews, J. P., in which said Herndon says, quoting the language claimed to be used by Jas. M. Earp, "If I was on the jury I'll be damned if I wouldn't hang him;" that such statement in the affidavit of said Herndon is untrue; that he never used said expression in his life about said case, and, as stated above, he had no opinion about the case one way or the other, because he had never heard any of the evidence and had read no account of it, as far as he remembers, and the deceased, Charles Carr, was an utter stranger to him, of whom he had never heard; that he had no personal acquaintance with said Thomas Allen, merely knowing him by sight, and, so far as he knows, never had any conversation or dealings with him,
61 and certainly had no prejudice or any cause for prejudice or bias against him.

J. M. EARP.

Sworn to and subscribed before me this the 7th day of Jan'y, 1895.

J. B. ANDREWS,
J. P., Bibb Co., Ga.

BIBB COUNTY, GA., *January 1st*, 1895.

I have known Jas. Earp a number of years, and would believe him on oath.

B. E. WILLINGHAM.

Sworn to and subscribed before me January 1st, 1895.

M. H. MASSEE,
Not. Pub., Bibb Co., Ga.

GEORGIA,
Bibb County.

Before me personally comes W. R. Phillips, who, being duly sworn, deposes and says that he knows J. M. Earp, and he is an upright and intelligent man; that he knows his character and reputation in this community, where he lives, and that it is good, and that from that character and reputation he would believe him on oath.

W. R. PHILLIPS.

Sworn to and subscribed before me this December 31st, 1894.

JOHN S. HARDIN,
N. P., Bibb Co., Ga.

62 GEORGIA, }
Bibb County. }

Before me personally comes Ben. L. Jones, who, being duly sworn, deposes and says that he knows James Earp, and that he is an upright and intelligent man; that he knows his character and reputation in this community, where he lives, and that it is good, and from that character and reputation he would believe him on oath. I have known him fifteen years.

BEN. L. JONES.

Sworn to and subscribed before me this January 1st, 1895.

GEO. W. GANTT,
N. P., Bibb Co., Ga.

63 GEORGIA, }
Bibb County. }

Before me personally comes E. W. Pickett, who, being duly sworn, deposes and says that in the affidavit which he signed on the 29th day of November, 1894, before M. R. Freeman, notary public, appears the statement that said James M. Earp took sides against Thomas Allen, and then and there, amongst other things in the conversation, stated positively and unequivocally if he was on the jury which was to try the case he would hang Thomas Allen; that, so far as he remembers the conversation referred to in said affidavit, *that* said Earp did not take sides against Allen, and did not use any expression which indicated any prejudice against Thomas Allen; that the way the conversation arose was about this: That a number of parties were in the store, talking about the killing of Carr, and that he, Pickett, said that, inasmuch as Allen did not know Carr, he did not see how he could have any malice against him, inasmuch as Allen was drinking and had never seen Carr, and therefore could not be presumed to have any malice against him; that he, Pickett, remarked that he did not think it was a hanging crime, because it didn't seem to him to be any malice in the killing, and that in the course of the conversation Earp remarked that from what he had heard he would hang him or any other man. The conversation referred to was merely an idle one among a party of friends talking, none of whom had probably heard any of the evidence. There was nothing in the conversation or expression which Earp used that indicated he had any prejudice or bias against Allen, the conversation being specially directed to what effect and bearing on the case of Allen intoxication would have at the time of the killing.

E. W. PICKETT.

Sworn to and subscribed before me the 2nd day of Jan'y, 1894.

J. L. ROUSSEAU,
N. P., Bibb Co., Ga.

64 GEORGIA, }
Bibb County. }

Before me in person comes Harry C. Mix, who, being duly sworn, deposes and says that he knows W. A. Johnston, and that he is an upright and intelligent man; that he knows his character and reputation in this community, where he lives, and that it is good, and that from that character and reputation he would believe him on oath.

HARRY C. MIX.

Sworn to and subscribed before me this 4th day of January, 1895.

V. A. MENARD,
Not. Pub., Bibb Co., Ga.

GEORGIA, }
Bibb County. }

Personally comes W. B. Daniel before me, who, being duly sworn, deposes and says that he knows William A. Johnston, and that he is an upright and intelligent man, and that he knows his character and reputation in this community, where he lives, and that it is good, and that from that character and reputation he would believe him on oath.

W. B. DANNIEL.

Sworn to and subscribed before me this January 4th, 1895.

V. A. MENARD,
Notary Pub., Bibb Co., Ga.

GEORGIA, }
Bibb County. }

Before me personally comes C. B. Massenburg, who, being dul*t* sworn, deposes and says that he knows W. A. Johnston, and that he is an upright and intelligent man; that he knows his character and reputation in this community, where he lives, and that it is good, and that from his character and reputation he would believe him on oath.

C. B. MASSENBERG.

Sworn to and subscribed before me this 4th day of January, 1895.

V. A. MENARD,
Notary Pub., Bibb Co., Ga.

65 GEORGIA, }
Bibb County. }

Before me personally comes Walter B. Chapman, who, being duly sworn, deposes and says that he knows William A. Johnston, and that he is an upright and intelligent man, and that he knows his character and reputation in this community, where he lives, and that it is good, and that from that character and reputation he would believe him on oath.

WALTER B. CHAPMAN.

Sworn to and subscribed before me this Jan'y 4th, 1895.

V. A. MENARD,
Not. Pub., Bibb Co., Ga.

GEORGIA, }
Bibb County. }

Before me personally comes M. H. Taylor, who, being duly sworn, deposes and says that he knows W. A. Johnston, and that he is an upright and intelligent man; that he knows his character and reputation in this community, where he lives, and that it is good, and from that character and reputation he would believe him on oath.

M. H. TAYLOR.

Sworn to and subscribed before me this January 4th, 1895.

V. A. MENARD,
Notary Pub., Bibb Co., Ga.

GEORGIA, }
Bibb County. }

Before me personally comes Theo. W. Ellis, who, being duly sworn, deposes and says that he knows W. A. Johnston, and that he is an upright and intelligent man; that he knows his character and reputation in this community, where he lives, and that it is good, and from that character and reputation he would believe him on oath.

THEO. W. ELLIS.

Sworn to and subscribed before me *this* Macon, Jan. 4th, 1895.

V. A. MENARD,
Notary Pub., Bibb Co., Ga.

66 GEORGIA, }
Bibb County. }

Before me personally comes C. M. Wiley, who, being duly sworn, deposes and says that he knows W. A. Johnston, and that he is an upright and intelligent man; that he knows his character and reputation in this community, where he lives, and that it is good, and from that character and reputation he would believe him on oath.

C. M. WILEY.

Sworn to and subscribed before me this 4th January, 1895.

V. A. MENARD,
N. P., Bibb Co., Ga.

GEORGIA, }
Bibb County. }

Before me personally comes C. L. Bartlett and N. E. Harris, who, being duly sworn, deposes and says that they know W. A. Johnston, and that he is an upright and intelligent man; that they know his character and reputation in this community, where he lives, and

that it is good, and from that character and reputation they would believe him on oath.

C. L. BARTLETT.
N. E. HARRIS.

Sworn to and subscribed before me this January 4th, 1895.

V. A. MENARD,
Not. Pub., Bibb Co., Ga.

67 GEORGIA, }
Bibb County. }

Personally comes William A. Johnston, who, being duly sworn, deposes and says that he was one of the jurors who tried the case of Tom Allen, and that the statement of facts in the affidavits of R. L. Smith, sworn to before J. H. L. Gerdine November 30th, 1894, and by J. D. Grace, of same date, before same officer, in which they state that said William H. Johnston made use of the expression, "I don't think much of the Amerson case, but I think there will be some neck-stretching in the Allen case," is unqualifiedly and unequivocally untrue; that he not only did not know the deceased and had never seen him, but he did not know the defendant, Tom Allen, even by sight and had never even heard of the man, and had heard nothing of the facts of the case; that while he read the facts of the killing when published in the papers he did not have any interest sufficient to even retain in his mind any of the circumstances, if they were published at the time by the papers, and believes, as he is an honest man, that he is and was absolutely impartial and absolutely free from any bias or prejudice either towards State or defendant at the time he qualified as a juror.

W. A. JOHNSTON.

Sworn to and subscribed before me this 4th day of January, 1895.

W. H. FENTON, JR.,
Notary Public, Bibb County, Georgia.

68 Dr. J. S. SULLIVAN, sworn for the State, testified:

I am a practising physician in this city. I was called to see Chas. Carr about midnight on the 13th day of September of this year. I found him at Cassidy's bar, on the corner of Fourth and Mulberry streets, where P. O. Holt used to keep store. He was lying rather on one side when I got to him—prostrate in the bar on the floor—just in front of the bar counter. Do not know how long after the shooting I got there. It was, perhaps, a little after midnight when I got to the place. Carr died in the afternoon of September 14th this year, in Bibb county. The cause of his death was a wound in the neck inflicted by a gun or pistol. From the appearance of the wound I would say that the character of the missile which entered was a bullet. Mr. Carr was shot just through the throat; he was struck about one inch or a fraction more above the top of the breast-bone, the bullet passing into the neck, severing the trachea or windpipe. The bullet seemed to range more to the

right; it severed here to one side, and it seemed to plow a furrow right across there. I did not see the bullet at all; I do not think it came out on the opposite side. I believe it was the cause of his death. I could not tell which direction the bullet went after it passed through the windpipe.

Cross-examination of Dr. J. S. SULLIVAN:

When I got there Dr. K. P. Moore and James Cassidy, the keeper of the place, were there: also a negro fellow that was there attending to Mr. Carr. I do not know who the negro was; I never paid much attention to him. He was a tall negro, according to my recollection. He waited on Mr. Moore and myself and assisted all that he could in the attention we gave Carr. Besides these I remember there was a young man by the name of Bernd, I think. I do not remember by name other parties who were there. They were coming in and out after the shooting. Chief Butner was there. These men were there when I first got there; those I have named. There
69 were some there that I did not know. A good many came in and went out while I was there. Dr. Moore and myself remained there perhaps a half an hour, and Dr. Moore came home after we had a talk outside. I visited Carr the next morning, myself and Dr. Moore. He had very little to say. Some one happen-to strike him in the face with a fan, and he turned his head and said, "In the name of God, do you mean to kill me?" In examining the wound when I got there that night I asked him the question if I punished him, and he said no. That is all that I remember that he said. Dr. Moore assisted me in examining him or I assisted Dr. Moore. He was Moore's patient. A negro man was present, who seemed to be very clever and attentive. I do not know except from hearsay how *it was* long it was between the shooting and the time that I arrived. My recollection is that he was lying with his head north and his feet to the wall. The north is towards the Mulberry Street door. His feet were to the wall—Fourth street. He was lying on the left side, according to my recollection, perhaps 6 or 7 feet from the south end, though I don't remember. He was lying opposite the south end of the counter. That is where I found him. I do not know whether he had been moved from where he fell before I reached him. His face was turned to the outer wall of Fourth street. Carr was a chunky, stout fellow, not very tall, about Col. Cooper's size. Nothing was being done to him when I first entered the room. He seemed to have been seriously shot. No one was doing much when I came to the room. I do not know where the negro was standing when I came in. What first called my attention to that negro he was around Mr. Carr, just giving him what attention he possibly could. I never noticed him, but I called to a hackman outside that I did not want him to wait for me, for I did not want to pay him, and this man cleverly told the hackman to drive away and come back. This man and others were ordered out of the house. It seems to me that the chief of police at some one's suggestion—I don't know whether

it was myself or Dr. Moore—I think he asked some of the people to leave the room; the room was too crowded for a man
70 in Carr's condition, and for the purpose of giving him more and better air we asked that they leave. I do not know whether this negro left at that time. I know that he was there afterwards. I probed for the ball and looked for the direction. The hole was sufficiently large to introduce your little finger, and Dr. Moore introduced his little finger in there to see if he could find what damage the bullet had done inside of the neck and ascertain what course it had taken, and after doing so he invited me. We took a flexible metal probe, but we could not ascertain anything with that—we could not feel any bullet. We probed right down. I said it plowed a furrow through the windpipe—cut one across it—at a point opposite where it entered. I can't tell whether it went upwards or downwards after it passed through. I don't know which direction it took. My idea is that the ball forced its way from where it entered straight through the neck and, as far as I know, lodged in the back of the neck. I never saw Tom Allen until next morning at the barracks. I am city physician. My office is at the barracks and I usually go there about nine o'clock in the morning. It was during my office hours—from 9 to 10. If my recollection serves me correctly, it was Saturday morning. He did not talk like a drunken man. I spoke to him about the condition of Carr and told him that morning that he was seriously hurt, but I had little hopes of him, and Allen said, "Do all you possibly can for him. I am very sorry for the occurrence; have no recollection of having done it."

SOL. MACK, sworn for the State, testified:

Am a policeman of the city of Macon; know Tom Allen. On the night of the 13th of September I was on the beat of Mulberry street and assisting from Third to Cherry street and from Cherry to Fourth and from Fourth to Third street, and about half past 11
71 o'clock I was standing at Mrs. Machold's corner, and there was a darkey came up to me by the name of Milas Wimbish and said, "You had better go down there, there is about to be a fuss," and I turned back, and I saw Allen and a darkey, the darkey in front of Mr. Allen, and from the corner I went down Mulberry towards Fourth. Allen was following the darkey and the darkey was saying, "Mr. Mack, make this man let me alone." Allen was drunk, and I knew him very well, and I spoke to him and says, "Tom, let him alone; if you don't you will get in trouble." Allen turned around and said, "All right, Mack;" and we walked together to the corner of Mulberry and Fourth streets, and Allen said, "I am going to take another glass of beer, and I will go to my room over Simmons' bar-room." He went in the bar-room and I walked to the corner on the Cherry Street side. There I met Mr. Edwards, my partner. Edwards and myself came across from Cherry up to the corner of Fourth and Mulberry to this bar-room, and Allen was inside, and as we came up there was 3 other young men in there, and in a little while they came out and passed us.

They were Will Wood, Homer Wood, and Mr. Goodwin. That left Allen and Carr in the bar-room by themselves. Mr. Allen started behind the counter and Carr was in his shirt sleeves behind the counter, and he says, "Don't come behind here," and Allen insisted, saying, "By God, I'm coming anyway." The window was just high enough for me to look in, and I saw the pistol hanging in his hand, down this way. I spoke to Edwards and said, "He has got a pistol in his hand; let's go in." Edwards was standing closer to the steps than I. We made a rush at the door. Just as we got on the inside of the door Allen fired, Carr fell backwards, and we arrested Allen. At the time when Allen fired, Carr was pushing him back and saying, "Don't come behind here, I don't want to hurt you." Carr had nothing in his hands that I could see. He fell to the floor. Allen had his pistol in his right hand.

72 When I first saw it it was hanging in the right hand down this way. I don't know where he got it from. We carried it to the jail after we arrested him. It was a blue steel Smith and Wesson hammerless 38. Only one shot was fired. When we got to him Allen was standing with the pistol over Carr who was lying there; we rushed in so quick, it all happened in the "squinkling" of an eye. Allen did not say a word. He first spoke after we got him on the streets; did not say much; asked us where we were going to carry him, and we told him we were going to lock him up. The shooting was done in Bibb county. That pistol is a weapon likely to produce death. When we left Carr there was two officers came across; I rapped for help; Fridell and Holsey and others rushed in, Goodwyn and Wood, and we left them there in charge of him. The bar is the length of the store. In the front part of it is the cigar stand and screen. We entered from the Fourth Street side. The counter is parallel with Fourth; the screen fronts Mulberry; when you enter on Fourth you enter into the vacant space of the room, except the bar counter, fixtures, &c. There is a good deal of space in front, only several feet behind the bar. Mr. Birdsing has the pistol in charge.

Cross-examination of SOL. MACK:

We went down to Cassidy's bar on the right of Mulberry, from the corner of the store below Mr. Dessau's office. Allen was not so overly drunk; I have seen drunker men. Allen went in the bar from Mulberry Street side. There were three stone steps at the door opening on the Fourth Street side. The window is about 15 or 20 feet from the steps, and opens facing the center of the bar counter, and from it you can see the whole room. Edwards and I went to the window first, just passing along looking in. I did not go to the door at all, nor did Edwards, before we went to the window. Just before the shooting there was nobody in there at all except Allen and Carr. If a man had been standing just

73 inside the door on either side of the door opening on Fourth street, or behind the door, anywhere near the shutter at the door, I could have seen him, because the screen was between the

door fronting Mulberry St. The bar is between the screen and Cherry street. The window opens into that back room and bar, and standing at the window I could not see a person inside of the house standing across the door from me, nor any one at the edge of the door or in front of it. When we were at the window Carr and Allen were talking friendly. Allen drank. Carr gave it to him. Carr did not drink with him, I think. They were talking across the bar. Carr was behind the bar. That was right in the center of the counter. When I looked in the window I saw Carr serving Allen with a glass of beer. I don't remember whether he took it with his right hand or with his left. He was between the counter and the refrigerator; had gotten around before could get in there. When Carr put his hand out and told him not to come he was between the shelf and the counter. We just got on the steps and Allen fired. I saw the shot myself. Mr. Edwards was a little bit ahead of me and I was right behind him. From the time we left the window till we entered the door—there was a wall between us—but there was such a short time there could not anything have happened. At the crack of the pistol Mr. Carr fell. Allen was leaning against the refrigerator with the pistol hanging down this way over Carr's body, which was behind the counter. When we got in there we saw nobody but Mr. Allen and Mr. Carr. Those other fellows that I mentioned they had just left the bar-room. They were drinking beer, and just come out a second or so before the shooting. They walked down a little, and Goodwin was nearest us. I did not see them take their drink. They came out on Mulberry Street door, is my recollection, and just passed down the street before the firing. They had gotten, I suppose, 2 or 3 doors down before the firing took place. Goodwin and the two Wood boys were there.

74 They *they* were right along by Jeff. Long's, a little this side. I don't think they saw the firing, except Goodwin; he was nearest us. When Allen started we rushed at him, and somebody came in behind; whether he saw the shooting I do not know. I do not know whether it was a negro or a white man; could not swear it was not a negro. I said they were two or three doors below, that was 25 or 30 feet towards Cherry St. A person standing 10 or 15 steps down the street could not see inside the bar-room where that thing occurred. I am sure of that. Could they stand on the sidewalk five feet from that door and see a person where Carr was killed, down that way? I never examined the place; I don't know whether the door is in the way or not. Allen did not resist us much, only just like a drunken man. He did ask us what we were going to lock him up for; he had not done anything. When we first took hold of him, right after that shot was fired, he said, "What are you arresting me for, I have not done anything?" The distance from the Mulberry Street door to the screen or blind door is a few feet. I was not requested by any one before that to arrest Allen on account of drunkenness; did not see him walk to the sidewalk and fall on his knees; did not help him up or see any one else do so. At no time that night did John Hubbard tell me to take Allen up because he was drunk and crazy. Don't know John

Hubbard. I have known Tom Allen for four years; when not drinking he is a peaceable man, as far as I know; he has always been a good friend of mine; he is good-natured and simple-minded. Edwards is taller than I am; my height*h* is 5 feet 6 inches.

Redirect examination of SOL. MACK:

Tom Allen's reputation when he is drunk is bad. I mean quarrelsome and wants to raise a row and pick up fusses. This is the pistol; we unloaded it at the city hall. One cartridge was fired, one snapped, and three were good. Don't remember whether the one that was fired was adjoining the one that was snapped or not.

I think Mr. Long, the city-hall sergeant, took the cartridges
75 out of the pistol in my presence. I did not see any snapping done except the firing. If there was an indentation of one I don't know when it was made or by whom.

J. B. EDWARDS, sworn for the State, testified:

I know Tom Allen there; was with Mr. Mack the night the shooting took place. Being an officer on duty, we walked up to the window on the Fourth Street side, and Mr. Allen was leaning against the counter, talking to the gentleman behind the counter, whom I did not know. In half a minute four young men came in and called for beer, drank, went out, and left Allen still leaning against the counter. The gentleman behind the bar, Mr. Carr, I suppose, was washing out the beer glasses. Allen started to go behind the counter, and he asked him not to. Allen said, "Well, I go where I please." Carr said, "Get out; don't come behind the counter," and Allen said, "I will get *get* out when I get ready." At this time Mr. Mack and I left the window where we were at and went to the door just 16 or 18 feet, and when we got to the door there we could look in. I saw a pistol in Allen's hand, and I started to go right in at the door. When I got to the door Allen had the pistol swinging down by his side, and Carr was still standing behind the counter, and Allen sort o' in between the end of the counter. Then he was still walking in behind the counter, and about the time that I stepped in at the door, they were four steps high from the outside to the floor, and about the time I stepped to the door he raised the pistol that way and fired. He was close enough to Carr to place his hands on him. He put his hands either on the beer-cooler or on Carr's shoulder. He had his pistol in his right hand. Carr's arms were swinging down. He had nothing in his hands, and was, as I recollect, in his shirt sleeves. Allen fired the pistol.

I was standing on the further side of the building, like the
76 jury stand there, and there was a vacancy between the counter, and there was two counters and a beer-cooler on this side like, and this was the gangway between and this was the counter and Carr's back here and the beer-cooler here and Allen where I am now. The ball struck Carr in the neck. Carr seemed to be 5 feet 8 or 9 inches high. When Allen fired the first shot Carr dropped right backwards. Allen did not have time to do anything then. I jumped right to him. I only had about 12 or 14 feet to go

from the door to him, and I run right to him and caught his hand, and he had the pistol in his hand this way, and I run my finger between his finger and the trigger and got hold of it that way. When I got my hand on it the pistol was pointed towards the beer-cooler. This is the same pistol. I examined it. Only one chamber was empty. The others were loaded. All the cartridges seemed to be in good condition. They seemed to be all right. When Mack and I entered no one was in the bar except the two men that I saw. If there was any one else they — concealed somewhere in the bar. I don't know how long after shooting any one else besides Mack and myself came in. I taken Allen right out, and as I went to the door I called to some young men there a few steps below the door on Fourth street and told them to go to the door. They were the same men that were in there drinking. I don't know whether they went in or not, as I had Allen to handle and did not notice them. I called them and told them the bartender was shot. I only saw Allen that night about two minutes before the shooting took place. Carr fell right behind the counter and the wall. I don't know whose place of business that is. The sign is James Cassidy. When Carr told him to get out he used an oath and says, "By God, I will get out when I get ready." I had been there two or three minutes; came from over on the corner where Jaques and Tinsley's grocery store is, on Cherry and 4th streets. Mack came for me. Mack was right with me on the outside. We were both trying to look in
77 at the window; but Mack was so low that he could scarcely see Allen; he could just see his head and shoulder. I could see as far as the top of the counter. I could see Allen about to his waist. I am 6 ft. one inch. Tom seemed to be drunk before the thing happened. I saw him take one drink. He did not have a pistol in his hand when he took the drink. I don't know whether he took the drink with the right or the left hand; I think with his right hand, though. I did not see a pistol until I got in front of the door. Mr. Carr was serving the beer. Allen taken a drink while these young men were in there. They came and called for beer, and Allen says, "I will take one, too," and they said, "All right," and when they went out on the Mulberry Street side of the store they came out around on Fourth street to the window where we were and went down past us. I don't know how far they had got down the street when the shooting occurred; not more than 20 or 30 steps, or probably not that far. There were two counters that came together, and he started to go through to get between the two counters. They were talking very friendly together. Don't know that Tom Allen knew the crowd at all. I don't know how long Carr had been there; I never saw him before. Mr. Allen was talking about having a good deal of money; that he had enough to carry him along through the world and he was getting along well, and such as that. Mack and I were right together at the window, but I was on the side next to the wall, which threw me nearest to the step, which enabled me to get in the house first. The door was wide open, as well as I recollect. There were no blinds at the

door we went in on the 4th Street side. When Allen made the remark "I will go where I please, by God," it was just then that Carr put his hand on him. Carr put his right hand on Allen's shoulder and says, "Go out from behind the bar," and Allen stepped one step backwards at the time. He just throwed up his hand in front of him and
fired. His arm (Allen's) was in a crook at the time of firing. He
78 was far enough from Carr to straighten his arm and point that way. Before that Allen had the pistol swinging down by his side. I cannot say that Carr seemed at the time to have been shot higher than the bowels, because his hand was sorter on the side of his body from me, and I could only tell his arm was up in this way. I cannot say how the pistol was, but it seemed the pistol was sorter hanging in his hand. It did not seem that it was right straight, as well as I could see; it was all done so quick I can't tell exactly. I have stated that the impression made upon me was that he was shot in the bowels, and that, handling the pistol loosely, it might have been thrown up that way by pulling the trigger. Did I see him point and shoot? Nothing more than raising the pistol this way. I saw his arm as he raised it up. He was very drunk. He was too drunk to know me. He knew me when he was sober. He did not call my name. He did not seem to recognize me. He asked me what I was taking hold of him for; that he had not done anything. I pointed to Carr and said, "Didn't you kill this man?" Allen said, "I will go with you; I have not done anything." He did not look at Carr. In other words, he was absolutely demented, according to my judgment. I am a policeman; have seen a good deal of drunkenness; have seen men crazy when they were drunk; but Allen was able to walk and go, and he knew Mack, and I cannot say that he was entirely demented because he knew Mack. He called Mack and spoke to him several times, and called his name after we started off, talking all the way up to the city hall. He had known Mack before that. They had been quite friendly as far as I know. Mack did most of the talking. I did not talk much. He recognized Mack, but did not recognize me. I have known him about three years; but I have known him as a man I saw around town, when he would come to town. Some men get drunk and walk straight. I have seen Tom drinking before, but not as drunk as he was that night.
I never saw him stagger before. When I went in and took
79 hold of Tom I did not see a colored man right then and there. A colored man did not come before I left to where Carr was. I suppose it was one minute from the time that I got to him and got the pistol away, and we put our chain on him as quick as we could get him out, probably a minute and a half or two minutes. I don't know exactly the time, because it was through excitement; not over 2 or 3 minutes, though. I did not see the pistol from the window. I don't know whether it could or could not have been seen. When we first went to the window Tom was leaning with his arm on the counter. He did not have any pistol in his hand then. His right hand was where I could see it. He was leaning with his left hand on the counter this way, with his arm over and the other hand lying on the counter like this. Tom knew

me as well as I knew him when he was sober. I talked with him a great deal. Tom drunk a glass of beer down, and he left a little bit and turned from the counter and spit out the last mouthful he had in his mouth on the floor, and he set the glass down with his left hand. When a man does that he is pretty full, generally.

Redirect examination of J. B. EDWARDS:

In the conversation between Allen and Carr in the bar-room there Allen seemed to understand Carr, and Carr Allen, and Allen talked intelligently and intelligibly. When the pistol — fired Allen's hand was about opposite Carr's breast. Allen is about six feet, I suppose; weighs about 220 pounds. Carr weighed, I suppose, about 200 pounds; don't think he was quite as tall as Allen. I said I thought Allen was demented. I suppose when a man was as drunk as Allen was he was partially demented, and by demented I mean that his mind was not as plain as it would be if he were not drinking. The mind was somewhat tangled. I don't know anything about the insanity part. He was drunk and sort o' crazy from whiskey, I suppose. Going to the barracks, he talked like any drunken
80 man would; asked a good many silly questions and a good many different questions. He would ask a question about one thing, and then turn off and ask something about something else that did not concern about what he spoke of. It seemed his mind was sorter wrangling or something. I cannot explain exactly.

Recross:

A man may be absolutely and completely drunk, and yet when a friend appears he once knew he would recognize him and call his name. I have seen that frequently. In going to the barracks Tom talked about the arrest and about not wanting to go to the barracks. Of course, it excited him when he was arrested, as it would any man.

GEORGE M. GOODWIN, sworn for the State:

On the night of September 13th, about 11.30 o'clock, we had been to the opera-house and we stopped at the corner to take the street car, and I says to the boys, "Let's go in and get a glass of beer before the car comes." Will and Homer Wood and Jack Holmes were with me at the door, the front door. We had our beer together, and as soon as they drank they went out and I pulled out a quarter and laid it on the counter, and Allen says, "Don't pay for that beer," and I says, "It is only a small amount; let it go," and he brought a nickle back and I taken it and put it in my pocket, and he says, "Don't go and leave me now;" Tom Allen did, and I says, "Wait, boys; I am going to bed," and when I started out Allen grabbed me in the back and said, "Come here," and I leaped out through the screen into the street, and I went out the Mulberry Street door, around the corner, and got on Mulberry street and whistled for the rest of the boys, and they answered me on Fourth street, and on Fourth

street, right under the window, there was two policemen there when I walked up—Mr. Mack and Mr. Edwards—and some of the boys
81 made the remark to me, "What is the matter in there?" I looked in and Allen was standing behind the counter and had his arm on Carr's shoulder. When we went to the door the two policemen and myself and Wood and Holmes started up the steps, and he backed back until he got between the counters, where we could look between there and see him. We could not see Carr. We could see Allen above the counter and the pistol in his hand. Allen had the pistol in his hand, and he had his left hand on Carr's shoulder, and he looked up and saw me and the two policemen standing in the door, and he took his gun up and shot Carr and Carr fell; and the policemen rushed right on Allen, and when I looked Edwards had him and Mack was putting the nippers on him, and we watched them until they started out; and we ran and we did not get more than 30 or 40 steps—they were on 4th street—and Mack called us and we all four went back and stayed. Carr was lying flat of his back, stretched behind the counter, struggling. We picked him up and brought him from behind the counter and turned him over on his face. There was some one in there about the time we got him from behind the counter. I did not see any negro in there. I did not see any one in there when I went in and came out. The 4th Street entrance was an open door. I suppose some one might have been hid behind the counter or they might have been on the outside of the screen—the door on Mulberry Street side. I did not see them, if they were there, when Allen grabbed at me. When the officers and I started in the door we were all three side and side. Edwards got to the man first, Mack next. I did not put my hands on Allen at all. While Edwards was taking the gun away from Allen Mack stooped down and put the nippers on him, and we broke and run when they started to come out with him.

Cross:

I live in Atlanta; am conductor on C. R. R. freight train, between Macon and Atlanta. I was taking my meals at Mrs. Wood's,
82 on Oglethorpe street, where Will Wood is. When I first entered Allen was leaning up against the counter and had his arm around Will Would, across his shoulder. The first thing I heard Allen say was when I was paying for the beer. He had a lead pencil in his hand, and he says, "Give me a piece of paper," and Carr says, "I have not got any." And he asked it again twice, I believe. Allen was pretty badly tanked up; he was pretty full. He did not drink at all; he never touched his glass. It was drawed there on the counter when I went in, and when we left it was there. I did not see him drink at all; he never drank it. I never saw any shutter to the 4th Street door. It was open wide when we went in. When I got out and whistled the boys were standing at the window on 4th street—three boys and two policemen. I stopped and made the 6th. I turned the 4th Street corner and whistled, and they answered, right by the window, and that is where I found them. I

guess the window was two and a half feet wide. The two policemen were standing closer to the window, and we were all behind them. I tiptoed and looked in. The two policemen said, "Let's go in there and get him out," and I says, Come on; I will go with you; and we started hastily. I was right along with them. The two Woods and Holmes were behind us at the time of the firing, coming up the steps. Was I there when the pistol fired? Well, if I wasn't, I was most. I ran because I did not want to be a witness. I went back because I was called back. If Mack and Edwards both said I was not there, I would say they deviated from the truth. I have had lots of people that *I* saw the shooting ask me if I saw the man shot, and I said, Yes. A darkey, I believe, washed Carr's face, if I am not mistaken. In a few minutes after we brought Carr out and laid him on his face the place was chocked full of people; never paid much attention to the darkey; he was about average height, I believe.

Redirect:

Have been in the employ of the Central railroad since 1890; have been conductor since the 7th of February a year ago. I am not regular. I am an extra conductor and flagman. I was a witness before the coroner's jury and before the grand jury.

JAMES CASSIDY, sworn for the State, testified:

I had known Carr 6 or 7 days; he had been in my bar that time, employed there. I got to the scene of the shooting at a quarter past twelve. Carr came from Asheville, N. C. We had agreed on a trade for an interest in the bar, but there was no money paid or writing drawn up or anything of that kind. Carr died at Cassidy's boarding-house, corner 4th and Oak streets, having been moved there at ten o'clock the following morning. He died at 7.45 p. m.

(The State here tendered in evidence the pistol, four cartridges, and one empty shell.)

Dr. K. P. MOORE, sworn for the State, testified:

I was the first physician that made an examination of Carr after he was shot; probably 30 minutes after the shooting. The wound was located just about here in the throat and went, I think, directly inward, directly backward. That wound was the cause of Carr's death. We did not find the ball, but, judging from the symptoms, I suppose it must have lodged in the spinal column and probably, I think, on the spinal chord. He was paralyzed, his lower extremities entirely so, and I am not quite — he could use his upper extremities — his arms. He was entirely helpless, and I should say it cut the swallow one-half *and* one-third in two, and I should say the ball went into the spinal column and rested on the spinal marrow. That was my conclusion. The pistol must have been fired pretty near on a level with the man who was shot to make a wound of that character.

84 Cross:

The "Adam's apple" was not struck; the ball went just below that.

State closed.

85 TONEY WILLIAMS, colored, sworn for the defendant, testified:

I know the defendant; saw the homicide. The reason that I was there I was in town, and was simply walking over the town with some young men, myself, and Louis Andrews. I have a sister here, and I had been up there, and I started back downtown, and I started in the bar to get a glass of beer. I saw a crowd of young white men. Mr. Allen was in the crowd, and he seemed to be a little gone or drunk, and he had a pistol in his hand, and I knew how he was with me, and I was trying to dodge. I stepped back behind the door, thinking they would finally walk out. Three or four young men went out, who seemed to be friends and to know one another. There was a crowd outside when I walked up, and I thought there was some kind of disturbance. There was a crowd at the side door—at the window. There was some kind of commotion, and I came around the other way and came on in. I don't know who those young men were. They were all laughing, and Mr. Allen had a pistol in his hand and seemed to be drunk. The boys that I heard talking came in from the Mulberry Street door and took a drink. When they went out Mr. Allen and the barkeeper were in there, and Mr. Allen had a pistol and was laughing and joking about something he had done about some money, and he had a roll of money. At that time there was only in that house Mr. Allen, the barkeeper, and myself. I was standing behind the door for two reasons—1st, I was hiding from Mr. Allen. I knew he would come to me and get to fooling with me with the pistol, as he had done many times, and it might go off; and, in the next place, I was standing there to get a glass of beer. Defendant was standing at the end of the counter nearly. I was standing straight behind the door, and he was standing there with the pistol in his hand, and his hand in one pocket and a pistol in the *in the* other hand talking to that man. They were laughing at first. I thought they were friends until the pistol fired. How did I see him when
86 he first held the pistol in his hand? He had it in his hand this way, telling something he had done. He simply had it this way, hanging down, when I saw him. He was flourishing it. When Allen fired they were standing, nearly facing each other. When the pistol went off I suppose Mr. Allen's wrist was touching the counter. When the shooting occurred I would call Mr. Allen blind drunk, crazy drunk. I have seen him drunk twice before. I think when Carr was shot he fell in that direction, towards the end of the counter; there was a great commotion and I was excited as well as everybody else and much more so. Two policemen, whom I did not know, came in first. They run everybody out; at least they thought they did; they locked the door, and after that

one policeman discovered that I was in there and ordered me out—a small policeman—and I went towards the front door, between the front door and the screen, and after they thought all was out I came from behind the screen up there and he did not discover I was there until I spoke; I says, "You ought to bathe the man's arms in some cold water." I took the pan and did so myself and Dave Boon. After that this policeman says, "I ordered you out of here once, and you had better stay out," and I went to the back door where I was at first, to the 4th Street door and opened it, and I did not go out. I walked behind it and closed it; there were several in there then, and he spoke to me again and says, "If you do not get out of here I am going to arrest you;" then I went out. The policemen took Allen out of the side door, I think it was. I went out behind them as quick as I could. I went straight down to Ike Harris' bar, and got Louis Andres and came back again. A fellow named Hiram Taylor kept a restaurant that I got supper at, and I got through and went back and stayed quite a while outside, and we got in and another policeman pushed me back out of the door again. I simply got my head in the last time. When I was bathing him the doctors were not there.

87 Cross-examination by the State:

Mr. Carr fell behind the counter. The counter runs parallel with 4th street. It seems to me like the counter is separate. I don't know whether the counter is in two, but there is something on it for whites and blacks. Allen was standing at the end of the counter towards the car shed. I believe that the beer-cooler was at the same end; don't think the bar counter runs as far as the side door; am not certain. Allen was standing right up to the counter, with his hand on it. The counter is on the opposite side of the room from the side door. I got in the counter by the side door nearest to the car shed. It was a single door. It was a solid door. I don't know whether it had any blinds. I never paid strict attention. When I came in the door was open, and I stepped behind it. Some one closed the door as soon as the flourishing of the pistol commenced; I don't know who. It is not a fact that the door was not closed at all. It was closed one time because I remember I thought I was there in Mr. Allen's view. As to how wide the door was open when I was behind there, it was straight with me. I would have to lean sometimes to see. The door had no spring on it because it stood. I don't know whether Mr. Carr could see me. I could see him occasionally. He was back out there, and Mr. Allen was nearly between me and him, and he was up farther behind the counter, and Allen was at the end. The policemen entered the side door. I was not behind any door. They opened the door. I am not certain. I think it was closed at the time; would rather swear that it was closed than that it was opened; don't know a policeman in the city; saw and recognized one of them here today. I think the little one, the one that spoke to me after he found that I had been locked in there, was the one who came first. (Here Sol.

Mack was brought in.) Yes, sir; I think that is the man. He was the one that I first saw. They came in pretty much together. When he first came in the room I think they
88 both said something to one another about getting some help. As — that part of it, I will state to you positively I can hardly know what they did say, I was so much excited; there was such a commotion and so much going on at that time. At that time the pistol had been fired four or five minutes, when these two men entered, and one or two or three more men came in. As to the young man I had seen at the bar, I don't know if he was not with them and the policeman right in the same bunch. I think so; I am not sure. I think he was behind the policeman. I don't know whether any more people came in after that or not. The people I have mentioned came within two feet of me, passing me. I would call it that. I was then behind the door. I am sure the door was open to the left going in; it is a single-shutter door. The policemen took Allen out. I don't suppose they were in there over four or five minutes. I had no idea of time at that time. The small policeman, Mack, told me to get out three times. When he first discovered me after they came back and had this man on the stretcher, when he found that I was there and the door was locked then. I don't know which one locked the door; there were four or five of them there. After the shooting these men had been away and came back, and so had I, and when he ordered me out the last time I had been away and came back. I thought I would get somebody else and show them. I got Louis Andrews and Hiram Taylor. We did not all come in. They came on the steps and I undertook to get in; that was the last time. They put me out the third time, and at last he told me if I did not get out I would be arrested. I went out behind them when they carried Allen. Who was in there at that time I don't know. There was several come right on in afterwards, and they commenced ordering everybody out, and I goes to the front part of the house and got behind the screen inside, and it was jammed outside trying to peep in. I have known Mr. Allen 2 or 3 years. I knew him up there where the still was on Dr. Glover's place. He
89 did not work at the still while I was there; Mr. Mitchell had it in charge at that time. I was frequently in Macon; was not doing anything at all at that time; was only 20 miles from here; was passing through here; had been on a visit home, and was — my way back to Juliette. The still had suspended; it was the summer months. It had been two or three months since I had been at work. I was going back to Juliette simply to spend the summer. I had gone to Augusta and went back. At Juliette I was doing nothing; fishing and hunting in Jones county. Juliette is the post-office. My family lives at Warrenton. I work twelve months in the year generally. I am a stiller. I think Mr. Allen lives at Dames Ferry. At the time the pistol fired Mr. Allen was standing right at the corner of the counter; Carr was behind the counter, nearly fronting Allen. I am sure Allen's right arm was touching the counter. Most of the time I was behind the door and

was looking right at Allen's back. At the time the pistol was fired he changed; he turned this way. He was backing all the while; first he would move around this way and then he would back. I saw about the end of the pistol when it fired; he was standing this way, backing with the pistol. At the time Allen fired the pistol he had no money in his hand, though he had had money—bills and some silver—in his hand, talking in a maudlin fashion about what he was worth, but put it back in his pocket. He was speaking about what he was able to do—what he wanted to do. It is not a fact that I was not there at all. The police will testify that I was there. When I first came in the house there were several; some were drinking beer and some whiskey. I was there about 15 or 20 minutes before the shooting occurred. Six or seven were in the crowd. I don't know how many drinks they took; they ordered drinks more than once; I think they took 2 or 3 rounds of drinks; I am sure they drank more than once. I don't know who paid for them; I think Mr. Allen paid for some of them. I did not know anybody, but I thought it was sort 'o treating one another, and I think the barkeeper set them
90 up once or twice. The barkeeper was a large man; clean face I think he was; had short whiskers on his face. He was a clean-shaven short-whiskered man. He had not shaved that day or recently, but he looked like a man accustomed to shaving. I don't remember whether or not he had a mustache. I did not wash his face. I bathed his arms and wound. I saw his face. The wound was close to the face. Don't know whether his hair was cut long or short; never paid much attention to that. The water I bathed him with I think a colored man handed to me in a pan, or some one else; am not sure whether it was a tin pan or a bowl; think it was a white bowl; am not sure whether it was a white man or a negro that handed me the bowl; the water was handed me from behind. I asked somebody for some water to bathe his arms, and the water was passed to me. I said, "Why not bathe his arms in cold water?" and Carr says, "He knows what he is talking about." His coat was already off. I simply pushed his sleeves back and bathed his arms. His collar was open. Some one had taken it open. I don't know whether the ball went through his shirt or above it; don't know whether he had on a collar and cravat or not. All this was open and the wound exposed; don't know whether the shirt opened from behind or in front. It was exposed when I was bathing him. I don't know who opened it. Some gentlemen that were in there brought him from behind the counter; don't know who they were; four or five of them, I think. They lifted him up to bring him out They put him on a white stretcher. I am absolutely sure of that, because I spoke about that position and raised his head higher, and told them I thought the blood would run down in there. I did not raise his head. They did. They did not hold it there. They put a chair under it. I don't think they turned him on his face.
They were behind the counter. I was not behind the
91 counter and saw the way they laid him on the stretcher. They laid him on his back. He must have been lying on

the stretcher when the doctors came. I was not there when the doctors came. When I left there I left him on the stretcher. Of this I am absolutely sure. I don't know who brought the stretcher or where it came from. I don't think the stretcher was there when he was brought from behind the counter. It must have been somewhere about there. He was quickly put on it. The stretcher was pure white. It looked like homespun. It was frame; two and a half or 3 feet wide, five or six feet long. It was a kind of cot, and the chair put under the head of it. They brought it from behind the counter in their hands. I was not there when they brought him. I was outside, I suppose. The first time I went out was when the police came in there. I never did go clear down the steps except the last time. When they ordered me out the first time I opened the door and stepped out on the steps and stepped right back; did not shut the door behind me; simply pulled it easy and slipped back around behind the counter. I had curiosity to see it; never was a witness before. I have seen men shot and been shot. I was never prosecuted. The first man I told about being there was Charley Terrill. Next morning on the early train I left here. This was at the distillery. I told him, as near as I could, how it happened. I told him at what they call the Wigwam at the distillery. I was at the warehouse. I next told Mr. Mitchell, I believe. He was running a distillery at that time. I never talked to any one else then for some time in the way of describing it that I remember. I simply mentioned the shooting to several that asked me about it. I am sure that Mr. Allen had his pistol out when I entered the door. He had it out when he was drinking the beer. I am absolutely sure of that. I never saw him put it up at all. I saw it in his hand all the time while he was there. He
92 was handling it in a very careless way—swinging it back; he would make gestures with it; he drank with his left hand. As to positions, the gentlemen were in a bunch; they were standing around and talking as men do as they drink at a counter. I did not strictly mark out the different positions they took, because I had my mind simply on waiting for them to go away. As to the first time I saw Mr. Carr, they had him in their arms, bringing him from behind the counter. Don't remember whether they had the stretcher or whether it was brought in afterwards. There was no doctor in when I was first ordered out. I don't remember anybody with any quilt. I did not know a man in the house except Allen. I cannot say whether there was a quilt under him or not. I had not drunk anything at all. I came here from Jones that evening. Am not certain whether or not that policeman (Officer Travers) was there or not; there was two there. Mack ordered me out after he went away with Allen and came back, all of twenty minutes after the shooting, I reckon. As to how they arrested him, I think they took hold of him one on each side of him and took him by the arm. I think they stopped by the door and put the handcuffs on him. I don't know exactly about that, how they did that, there was such commotion. I think they caught him on each side about the muscle of the arm. I did not see the policeman take the pistol away from

him; if I did I don't recall it. I was trying to get out and did go out behind them, out of the door as they stepped out. I had curiosity, but I did not want to be there where the crowd was. I was trying to be shunned from being put out. The crowd followed Allen out when the policeman carried him out.

Redirect:

If the policemen took the pistol away from Allen I did not see them; the pistol he had it flourishing it, and I was not trying to see it. I was trying to shun the firing of the pistol and any-
93 thing else, and I was behind the door for two reasons—to shun the pistol if it went off and shun the sight of Mr. Allen. I did not drink that night there. I was aiming to take a glass of beer after the policemen took Allen out. I think there were some one — two policemen there all the time. I never talked with old man Allen about this case in my life. I have talked with young Wyley Allen about it. I first had knowledge that I had to come to this court last night at 8 o'clock. I was at Brandon's distillery, in Gordon. My home was at Warrenton. I had a subpœna when I was brought here. I was sent for by the bailiff and brought here.

Dr. A. J. FULLER sworn for the defendant:

I reside in Monroe county; am a physician; have resided there all my life; was born and raised there, near where I live. I have known the family of Tom Allen comparatively intimately for 15 years. I have known Tom about that time. When sober Tom was a pleasant man and a good friend and a good neighbor, so far as I know, rather exceptionally so. He was an excellent man; he was tender-hearted; he felt for people. I have seen him cry over the misfortunes of others. When drunk he was a little bit different from other people when they are drunk. He was fond of talking about fighting. I never saw him fight, but he would talk about it, and he would generally show his pistol when he was drunk. I don't know that I noticed him further than that. I have seen him when he was drunk with his pistol, handling it very carelessly. He was irritable when he was drunk, though he was not a high-tempered man, but equable. He has gone so far as to be on the verge of delirium tremens, and he seems to have lost his memory when he was drunk.

Cross:

I have heard about Tom fighting. I have heard Tom's neighbors say that he was not a dangerous man when drinking;
94 have heard them express themselves as not afraid of him; that he was even good-tempered and did not fight. I have heard of Tom's being in a difficulty once or twice, but the other man precipitated the fight. He was drinking when he had the difficulties. That is what I heard. I have never known him to have any difficulties when he was sober. I have heard of Tom's having three difficulties, I believe, when he was drunk. Two were not serious at all; the third was pretty serious. These difficulties

have been had, I suppose, within the last six or eight years. Tom was more disposed to boss when drinking, and more willing to enter danger than when he was sober.

WILEY ALLEN sworn for the defendant:

Am brother of defendant. Tom was good-natured and had as many fusses when sober as when drinking; never knew him to have any fusses but once or twice, and a fellow or two run on him and he tried to defend himself. I don't think there was ever a man of better disposition than Tom when he is sober. Tom's general reputation for peace and quiet in the neighborhood is good. In the last four or five years Tom's mind when he is sober is not good. Of course, it is worse at times than at others.

F. F. WALKER sworn for defendant:

Have known Tom Allen intimately for ten years. His character for peace and quiet is good.

Cross-examination:

Tom is regarded as more dangerous when he is drinking than when he is sober. He is perhaps a little nervous when drinking—excitable and irritable. I have heard of Tom's having a spat or two. I don't think he ever had a regular combat or fight that I heard of. I have heard of his having a difficulty at Dames Ferry, but not a pitched battle fight. He had a little unpleasant-
95 ness. He has got cut. Tom lives near Dames Ferry—8 or 10 miles from me. Tom is regarded as being a man when he is drinking if you urge a difficulty with him you can get one. I think that is the way he is regarded there. He is not regarded as ready to get in it without any particular urging.

JOHN PITTS sworn for defendant:

I live in Monroe county; know defendant; acquainted with him in all 9 or 10 years. His general character for peace and quiet is good.

Cross-examination:

I have heard that he is a little boisterous at times, but I have never heard he was a dangerous man when he was drinking. I never heard of Tom's having a difficulty when he was drinking but once; don't know whether he was drinking then; only heard of one fight. I live 9 or 10 miles from him. Me and his brother join lands.

FRANK ROQUEMORE sworn for the defendant:

I live in Monroe county; know defendant; have known him 12 or 15 years. His character for peace and quiet is good as far as I know.

Cross-examination:

Have heard of Tom's having one difficulty; cannot say more than one. I live ten miles from him, I guess. He visits in my

neighborhood. How often I can't say. His brother married my sister.

96 Dr. R. B. BARRON sworn for defendant:

Am a physician. If the ball entered about an inch or an inch and a half from the trachea and could not be traced any further it entered in a horizontal direction about an inch or an inch and a half below the larynx and just above the breast-bone. Where would it lodge? If it did not go through, I would think it would lodge about the first or second dorsal vertebra.

Cross-examination:

If paralysis immediately set in, so as to completely prevent a party from having the use of the lower limbs, I would say the ball had lodged in and had injured the spinal column.

J. C. OSBORN sworn for the defendant:

Have known Tom Allen's character for peace and quiet; it is good; have known him 11 or 12 years. I have had occasion to go and measure this window down here at this bar—the window on the Fourth St. side—this morning, with a tapeline, from the top of the window-sill to the bottom of the walk. The height is five feet ten inches. I never did know Tom to do any particular meanness; he was rowdy sometimes when drinking, and he was a little troublesome, but he never gave me any trouble. I never called him quick to fight, for I always thought him to be a coward. It is a fact that when he gets under the influence of liquor he tries to fight. I refer to what other people say of him. It is not a fact that his reputation is when he is drinking prone to fight and desirous to fight. I never knew him to fight anybody. I have heard of some little difficulties he has been into, about three, within eleven years. I think he was drinking right sharply both times.

97 MACK WILLIAMSON sworn for the defendant:

Have known Tom Allen 15 or 20 years; live at Dames Ferry. His general character for peace and quiet is good.

Cross-examination:

He is rough and rowdy when he is drinking; a little; no worse than any other man; have heard of two fusses he has had when drinking. Occasionally when he would go to town he would get drunk.

SIDNEY SIMMONS sworn for the defendant:

I know Tom Allen. My place of business is the corner of Fifth and Mulberry. I run a bar and restaurant. Tom was in my bar the night Carr was killed. The last time I saw him he was drinking so that I tried to get him to go upstairs and go to bed and not to go on the streets. I refused to sell him whiskey, because I thought he was too drunk to have more. He wanted some to carry with him. I would not let him have it. That was about eleven o'clock

at night. After this Tom went out through the side door into the wagon yard, and from there to the streets. When I told him I could not sell him any more he said he had plenty of money and he could buy it somewhere else. He understood what I told him. It is 75 yards from my place to Cassidy's bar; have known Allen ten or twelve years. When drinking Tom is always full of talk and plenty of money. I think he would fight when he is drinking. I think he was a man that people did not want to come in contact with when he was drinking, because they did not want to get in trouble with him.

Redirect:

When Tom came around he would often have his pistol out. While he had nothing against me, I dreaded him or any other man when he is drinking that is handling a gun around me, be-
98 cause I don't want to be shot. When a man is drinking he is more apt to take exceptions at what you say than a man that is sober or a man that is not drinking. He had been behind my counter when he was sober and when he was drinking. I did not prevent it because I knew him well.

Statement of the Defendant.

GENTLEMEN OF THE JURY: This man Carr, they say I killed him. If I did I do not know it. From what they have proven I must have done it. I would not have done it for my own life. I rather give my own life than killed him.

Defendant closed.

99 BENNETT JONES sworn for the State in rebuttal:

September 13th, this year, I was living in the house on the corner of Fourth and Mulberry, opposite Cassidy's bar. I was just fixing to go to bed, and I heard the shooting and heard the voice of a man, "Somebody run here and help arrest that man; he has killed that man for nothing." The voice was John Felder's. I went across the street in my shirt sleeves. I don't suppose it was over 2 or 3 minutes after the shooting. When I got to the bar I found a man lying on the floor, with 2 or 3 men in there—one negro and 2 or 3 white men. The negro was John Felder, a one-legged negro shoemaker on Fourth street. I did not see any other negro. If Tony Williams was in there, I did not see him; he was not standing out in the floor. Carr was lying on the inside of the corner, around behind the counter. We taken him and brought him to the floor. By "we" I mean those men I found there—young men. We brought Carr from behind the corner and laid him on the floor four or five feet from the end of the counter. Tony Williams was not there then. When Carr was brought around there he was laid out on the floor, and they sent to my house and got a bowl and pitcher and water and towels and commenced to wash the blood off him. Myself and George Mitchell washed it off. We stayed there with Carr,

and George Mitchell left us about sun-up to go to his work. There was only three of us that staid with him. (George Mitchell was here brought into the court-room.) Myself and George Mitchell and Walter Dent were the three men that staid with him from the time that I got in there until after sun-up, and George left us at five o'clock to go to his work. Tony Williams came after Dr. Moore and Sullivan dressed the wound, about three-fourths of an hour after the shooting. He came in from the lower door on the Fourth Street side to where this man was lying, and we got him on a spring or cot—we sent to the jail and got one—and after Carr's wound was dressed Tony told us to bathe his wrists in cold water, and he folded up some clothes himself and sort o' raised his body and arms up and placed them under him and give some instructions to us, and Mr. Travers—it seemed the doctors were giving us some instructions, and we did not pay any attention to him—and Mr. Travis told him to get out. He had not been there before, that I had seen. The door on the Fourth Street side is a double door, meeting in the middle, a latch below and one above, and one opens to the right and the other to the left, on the inside of the building.

Cross:

I had been sitting on my porch a half hour or three-fourths or longer before I went in. Tom Allen had passed by, going towards Cassidy's bar. I said, "Hello, Tom." He was staggering and went across into the bar.

Redirect examination:

The door is nine feet high. Three feet from the floor is plank, and the balance to the top is glass. The room was lighted by electric lights. The time that Travis ordered Tony out was an hour or longer after the shooting. The counter is 3 ft. 10 inches and 2 ft. wide.

SOL. MACK, recalled by the State:

It took us 15 or 20 minutes to take Allen to the barracks. We walked there and back. We staid at the barracks 10 minutes; then we went back. I never saw Williams in my life before until yesterday. I did not order him out of the house before I went to the barracks. He told a lie. I did not order anybody out of the house before I went to the barracks.

Cross:

My height is five and a half feet. I swear today, as on my direct examination, that Goodwin was not at the window with me and Edwards. I said if Goodwin was behind me I did not know it. My attention was on Allen, Edwards, and myself. Edwards and I were the only ones that went in at the door. We were the only ones also from the window to the steps. That I know.

State closed.

BOB THARP for defendant in rebuttal:

I saw Allen on the night of the killing of Carr lying on the sidewalk, right at the corner as you come up on the curbing around the sidewalk near Cassidy's. I suppose it was 10 or 15 minutes to 1. This was on the Fourth Street side. I did not hear the shot.

Cross:

He scrambled up and was staggering on up this way.

GEORGE MITCHELL (colored) sworn for the defendant:

I was 10 or 15 steps from the door of Cassidy's bar, on Fourth street, when the shot fired. I went in there immediately. In a few minutes there was a colored man in there; I reckon 4 or 5 minutes. I went and got a bowl of water and went to work to the best of my judgment. That man (Williams brought in) is the man, I think. Two policemen came in there after the shooting, and it was one of them who ordered Tony out.

Cross:

I came in the Fourth Street door. I did not open it; it was open. They are glass doors, about 3 feet high. Bennett Jones got there pretty soon after I got there. I was in there before the shooting, and when I got to the door I saw Mr. Allen with a pistol in
102 his hands. I was five or ten steps from the door when the pistol fired. This Dutchman that stays at the Progress Club, he helped me to lift Mr. Carr up, and I cut his shirt off of him, and I borrowed a knife from Mr. Krutz. Tony Williams was there then. He claimed to be a doctor, and he wanted to give some kind of ideas about the matter, and they made him go out. I think there was two policemen and the chief; all ordered him out. I saw Tony Williams in there before the chief or police came. The first time that I recollect seeing Tony was 5 or 10 minutes after the shooting was done. The fact is that all I remember is that I saw Tony there.

JOHN ROBERTS sworn for the defendant:

A very slight pressure with the finger on this pistol will make it go off, the first joint of the thumb pressing on the *the* back spring. It is a regular hair-spring pistol.

Cross:

Am not an expert on pistols. I own one of these.

MACON, GA., *January 5th*, 1895.

We hereby agree that the within brief of evidence is correct and a true statement of the evidence had on the trial of the case of The State *vs.* Tom Allen, charged with murder.

DUPONT GUERRY,
J. W. PRESTON,
WALTER GRACE,
J. H. BLOUNT,
For Pl'ff in Error.

J. RANDOLPH COOPER,
W. H. FELTON, *Sol. Gen. M. C.*,
For State.

103 Approved and ordered filed Jan'y 5th, 1895.

J. M. GRIGGS, *J. S. C.*

Filed in office January 8th, 1895.

ROB'T A. NISBET, *Clerk.*

104 STATE OF GEORGIA, }
Bibb County. }

In his own proper person comes Thomas Allen before me, who, being duly sworn, deposes and says that he desires to take his case, the same being the case of The State *vs.* Himself, in Bibb superior court, in which he was convicted of the crime of murder, to the supreme court of Georgia, and that because of poverty he is unable to pay the cost in said case.

TOM ALLEN.

Sworn to and subscribed to before me this the 5th day of Jan'y, 1895.

J. B. ANDREWS,
J. P., Bibb Co., Ga.

105 GEORGIA, }
Bibb County. }

CLERK'S OFFICE, SUPERIOR COURT.

I, Robert A. Nisbet, clerk of said court, do certify that the foregoing seventy-nine pages contains a true copy of the record as specified in the bill of exceptions in the within-stated case as material to a clear understanding of the errors complained of, and that the term of court at which said case was tried has not adjourned.

Witness my official signature and seal of office this 21st day of February, 1895.

[SEAL.] ROBERT A. NISBET, *Clerk.*

106 [Endorsed:] File —, No. —. No. 3, criminal docket. March term, 1895, supreme court of Georgia. Allen *versus* The State. Transcript of record. Filed in office Feb'y 22, 1895. Logan Bleckley, D. C., S. C. Ga.

107 Supreme Court of the State of Georgia.

ATLANTA, GA., MONDAY, *March* 4, 1895.

The March term, 1895, of the supreme court of the State of Georgia was opened at 10 o'clock a. m. this day.

Present: Their honors Thos. J. Simmons, chief justice, and Sam'l Lumpkin and Spencer R. Atkinson, associate justices.

The following order was passed:

THOMAS ALLEN }
v. }
THE STATE. }

This being a case of capital felony, and the plaintiff in error being under the sentence of death, and it appearing to the court by suffi-

cient evidence, upon the call of the case in its proper order for argument, that the plaintiff in error has escaped from the jail in which he was confined and is now at large, a fugutive from justice, so that no judgment this court might pronounce could be executed, either by a resentence in case of affirmance or by a new trial in case of reversal, it is therefore ordered that the writ of error be dismissed unless he shall within sixty days from this date surrender himself to the custody of the proper officer, or shall be recaptured, so as to be subject to the jurisdiction of this court, and shall furnish evidence thereof by filing the same in the clerk's office. It is further ordered that the solicitor general may produce to this court evidence of such surrender or recapture, and if before the expiration of the said sixty days the plaintiff in error is again in custody, the case will be reinstated and reset for argument.

Supreme Court of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *May* 13, 1896.

I certify that the above is a true extract from the minutes of the supreme court of Georgia.

Witness my signature and the seal of said court, affixed the day and year last above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON, *Clerk.*

108 Supreme Court of the State of Georgia.

ATLANTA, GA., *May* 6, 1895.

The honorable supreme court met pursuant to adjournment.

Present: All of the justices.

The following order was passed:

THOMAS ALLEN
v.
THE STATE.

This case came before the court upon a transcript of the record from the superior court of Bibb county, and—

It appearing that the plaintiff in error did not within the time limited in the order heretofore passed in this case surrender himself to the custody of the proper officer, so as to be subject to the jurisdiction of this court, and furnish evidence thereof by filing the same in the clerk's office, and it further appearing that he has not been re-arrested since his escape from jail, it is now ordered that the writ of error in this case be finally dismissed.

Supreme Court of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *May* 13, 1896.

I certify that the above is a true extract from the minutes of the supreme court of Georgia.

Witness my signature and the seal of said court, affixed the day and year last above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON, *Clerk.*

109 Supreme Court of the State of Georgia.

ATLANTA, GA., SATURDAY, *October* 5, 1895.

The honorable supreme court met pursuant to adjournment. Present: All of the justices.

* * * * * * *

The court adjourned till court in course.

T. J. SIMMONS, *C. J.*
SAM'L LUMPKIN,
Associate Justice.
SPENCER R. ATKINSON,
Associate Justice.

Supreme Court of the State of Georgia.

CLERK'S OFFICE, ATLANTA, *May* 14, 1896.

I certify that the above is a true extract from the minutes of the supreme court of Georgia.

Witness my signature and the seal of said court, affixed the day and year last above written.

[Seal Supreme Court of the State of Georgia, 1845.]

LOGAN BLECKLEY,
Deputy Clerk.

110 THE STATE *vs.* TOM ALLEN. } Indictment for Murder in Bibb Sup'r Court. Tried at November Term, 1894. Verdict, Guilty.

Ordered that the remitter in this case be entered on the minutes and the judgment of the supreme court be made the judgment of this court.

July 13th, 1895.

JOHN L. HARDEMAN,
Judge S. C. M. C.

W. H. FELTON, JR.,
Sol. Gan. M. C.

111 THE STATE } Indictment for Murder in Bibb Sup'r Court.
vs. } Tried at November Term, 1894. Verdict,
TOM ALLEN. } Guilty.

The jury empannelled and sworn to try this case having found the defendant, Tom Allen, guilty, and no reason being shown why the sentence of the court should not be pronounced—

It is therefore considered, ordered, and adjudged by the court that you, Tom Allen, be taken from the bar of this court to the common jail of Bibb county, where you shall be safely kept until Friday, the 22nd day of May, 1896, on which day, and between the hours of eleven o'clock a. m. and one o'clock p. m., you shall be by the sheriff of said Bibb county taken to the gallows erected within the jail yard, and there upon said gallows you shall be by said sheriff hanged by the neck until you are dead, and may the Lord have mercy on your soul.

It is further ordered that said execution be done privately, and that no one be admitted thereto except such guards as may be necessary and two clergymen and members of the family and such intimate friends of said Tom Allen as may desire to be present.

It is further ordered that the sheriff procure attendance of two reputable physicians to determine when death shall supervene.

Pronounced in open court this Saturday, the 25th day of April, 1896.

JOHN S. CANDLER,
Judge Superior Court, Presiding.

112 GEORGIA, }
Bibb County. }

CLERK'S OFFICE, BIBB SUPERIOR COURT.

I, B. J. Holt, deputy clerk of said court, do certify that the foregoing two pages *is* a true copy of the order making the remitter from the supreme court the judgment of this court and the sentence passed on the 25th day of April, 1896, as the same appears on the minutes of said court.

Witness my official signature and seal of office this 14th day of May, 1896.

[Seal Superior Court, Bibb County, Ga.]

B. J. HOLT,
Dept. Clerk.

Filed in office May 19, 1896.

Z. D. HARRISON,
Cl'k S. C. Ga.

113 CLERK'S OFFICE, SUPREME COURT OF GEORGIA,
ATLANTA, GA., *June* 10, 1896.

I hereby certify that the foregoing pages, hereto attached, contain the entire record and proceedings in the case of Thomas Allen *v.* The State of Georgia, as appears from the records and files of the supreme court of the State of Georgia, together with a certified

transcript from the superior court of Bibb county showing the final disposition of said case in said superior court.

Witness my signature and the seal of said supreme court, hereto affixed the day and year above written.

[Seal Supreme Court of the State of Georgia, 1845.]

Z. D. HARRISON, *Clerk.*

Endorsed on cover: Case No. 16,420. Georgia supreme court. Term No., 641. Thomas Allen, plaintiff in error, *vs.* The State of Georgia. Filed November 28th, 1896.

166-138

166-138

Office Supreme Court, U. S.
FILED
JAN 12 1897
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 641.

THOMAS ALLEN, *Plaintiff in Error,*

VS.

THE STATE OF GEORGIA.

In Error to the Supreme Court of the State of Georgia.

BRIEF FOR PLAINTIFF IN ERROR.

W. C. GLENN,
DAN'L W. ROUNTREE,
401-406 TEMPLE COURT,
ATLANTA, GEORGIA,
Counsel for Plaintiff in Error.

C. P. BYRD, PRINTER, ATLANTA

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 641.

THOMAS ALLEN, Plaintiff in Error,

vs.

THE STATE OF GEORGIA.

In Error to the Supreme Court of the State of Georgia.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT.

The Plaintiff in Error was, at the November Term, 1894, indicted in the Superior Court of Bibb County, Georgia. The indictment charged, that Plaintiff in Error did, on the 13th day of September, 1894, kill and murder Charles Carr, by shooting him with a pistol.

The trial of the case was had at the November Term, 1894, of said Court, and on the 28th day of November, 1894, the Jury returned a verdict finding the Defendant guilty.

Subsequently, a motion for new trial was made upon various grounds, and the same being afterwards over-ruled, a writ of error was sued out by said Thomas Allen upon said ruling, to the October Term, 1894, of the Supreme Court of Georgia, and various errors were therein assigned to the rulings of the Judge of the Superior Court of Bibb County, in over-ruling said motion for a new trial.

During the pendency of said writ of error and before the

hearing of argument or decision thereon by the Supreme Court of Georgia, Plaintiff in Error escaped from the custody of the jailer who was holding him in confinement under said conviction in Bibb County jail; and he remained at large until he was again received into the custody of said jailer in said jail, on or before the 26th day of April, 1896, where he is now and has remained ever since said last named date.

On the first day of the March Term, 1895, immediately succeeding the October Term, 1894, of the Supreme Court of Georgia, an order was passed by said Court, in which the court after stating that "it appeared to the Court by sufficient evidence, upon the call of said case in its proper order for argument, that the Plaintiff in Error had escaped from the jail in which he was confined, and is now at large, a fugitive from justice" ordered: "That the writ of error be dismissed unless he shall within sixty (60) days from this date, surrender himself to the custody of the proper officer, or shall be recaptured, and shall furnish evidence thereof by filing the same in the Clerk's office," and further ordered "that the Solicitor General may produce to said Court, evidence of such surrender or recapture, and if, before the expiration of said sixty (60) days, the Plaintiff in Error is again in custody, the case will be re-instated and re-set for argument."

On the 6th day of May, 1895, immediately after the expiration of the said sixty (60) days, and during said March Term, 1895, of the Supreme Court of Georgia, said Court passed an order "finally dismissing said writ of error"; the Court stating in said order that "it appeared that the Plaintiff in Error did not within the time limited in the order heretofore passed in this case, surrender himself to the custody of the proper officer so as to be subject to the jurisdiction of this Court and furnish evidence thereof in the Clerk's office, and that it further appeared that he had not been re-arrested since his escape from jail."

That said writ of error was on said 6th day of May, 1895, finally dismissed in the Supreme Court of Georgia, as provided in said order.

That said March Term, 1895, of the Supreme Court of Georgia finally adjourned by order of said Court, on October 5th, 1895.

On the 25th day of April, 1896, subsequent to the passing of said orders by the Supreme Court of the State of Georgia Plaintiff in Error was, by the Judge of the Superior Court of Bibb County, sentenced to death by the gallows, on the 22nd day of May, 1896.

On the 19th day of May, 1896, this writ of error was sued out to the aforesaid judgments and orders of dismissal of the Supreme Court of the State of Georgia in this case.

ASSIGNMENT OF ERRORS.

Six errors are assigned in the writ of error:

I.

That the Supreme Court of the State of Georgia erred in dismissing the writ of error in the above stated case.

II.

That the Supreme Court of the State of Georgia erred in passing, on March 4th, i895, the order following:

"This being a case of capital felony and the plaintiff in error being under sentence of death, and it appearing to the Court by sufficient evidence, upon the call of the case in its proper order for argument, that the plaintiff in error has escaped from the jail in which he was confined and is now at large, a fugitive from justice, so that no judgment that this Court might pronounce could be executed, either by a resentence in case of affirmance or by a new trial in the case of reversal, and it is therefore ordered that the writ of error be dismissed unless he shall. within sixty days from this date, surrender himself to the custody of the proper officers, or shall be recaptured, so as to be subject to the jurisdiction of this Court, and shall furnish evidence thereof by filing the same in the

Clerk's office. It is further ordered that the Solicitor-General may produce to this Court evidence of surrender or recapture, and if before the expiration of said sixty days, the plaintiff in error is again in custody, the case will be re-instated and reset for argument."

This order was error, first, because there was at the time no sufficient or legal evidence before the Supreme Court of the State of Georgia, on which to pass the same; second, because the said order was a violation of due process under the Constitution of the State of Georgia; third, because the said order was a denial of due process under the Constitution of the United States; fourth, because the time limited in the order was too short and it ought to have extended until the beginning of the next term of the Court, and, in any event, to the end of the then term.

III.

That the Supreme Court of the State of Georgia erred in passing, on May 6th, 1895, the following order:

"This case came before the Court upon a transcript of the record from the Superior Court of Bibb County, and—

"It appearing that the Plaintiff in Error did not, within the time limited in the order heretofore passed in this case, surrender himself to the custody of the proper officer, so as to be subject to the jurisdiction of this Court, and furnish evidence thereof by filing the same in the Clerk's office; and it further appearing that he has not been re-arrested since his escape from jail, it is now ordered that the said bill of exceptions be finally dismissed."

This was error because, first, by the terms of the order the burden was put upon this plaintiff in error to establish his right to have his case decided on the merits; second, because it was a denial of due process of the law, of the Constitution of the State of Georgia, and was also in violation of the provisions of the Constitution of the State of Georgia, which guaranteed due process of law and which sections are

quoted in the petition for writ of error, and are hereby incorporated into and asked to be taken as a part of this assignment; third, because the passage of said order and judgment dismissing this case was a denial of due process of law guaranteed by the Constitution of the United States; fourth, the said order was passed before the end of the term and at a time when it was probable the defendant might be brought within the jurisdiction of the Court; fifth, because the said order should have been made conditional, and the time therein should have been extended to the beginning of the next term of the Supreme Court, and at least until the 5th of October, 1896, the date of the adjournment of the said Supreme Court; sixth, because the said order was a denial of due process of law, in this, that the said case should have been kept upon the docket of the said Supreme Court of the State of Georgia, until the defendant was again brought within the jurisdiction of the Court; seventh, that the said Supreme Court of the State of Georgia had no power to pass said order, because the same was a denial of due process of law under the Constitution of the United States; eighth, because if said order be based upon any law or statute, or usage sanctioned by the State of Georgia, then the said law, statute, or usage is in violation of the Constitution of the United States and is beyond the power of the State of Georgia to enforce.

IV.

Because it is essential to due process of law, within the meaning of the Constitution of the United States, that the said case of Allen against the State be disposed of upon its merits, and a dismissal of it in the manner stated in the record and upon the grounds therein is in violation of the Constitution of the United States, which prohibits a denial to any person of due process of law.

V.

That the Supreme Court of the State of Georgia in passing this order transcended its power, and passed the same

without sufficient evidence, and put upon the Plaintiff in Error, Allen, the burden of showing his right to a hearing in the Supreme Court of the State of Georgia, and that this was a denial of due process of law under the Constitution of the United States.

VI.

That the Supreme Court of the State of Georgia erred in holding that its jurisdiction in the said case could be exercised to dismiss this case without hearing, and that in thus holding, it denied to the Plaintiff in Error, Allen, due process of law under the Constitution of the United States.

ARGUMENT.

Practice in the Supreme Court of Georgia as to Writs of Error and the Dismissal Thereof.

Sections of the Code of Georgia of 1882, and the rules of the Supreme Court of the State of Georgia bearing upon the questions made by the assignments, and writ, of error in this case are as follows, to-wit:

"Section 4271. *Decisions at First Term.* The Supreme Court shall proceed to hear at the first term (unless prevented by providential cause) all cases properly docketed, and with the records made up ready for a hearing. [The Court shall decide all questions presented in the record of each case carried up to it for review.] (a) And no continuance shall be allowed except for providential cause."

"Section 4271(*a*). *Where the case cannot be disposed of.* Whenever the Supreme Court of this State may, from any cause, be unable to dispose of all cases on its docket for any term before the time fixed by law for the succeeding term to begin, it shall be lawful for said Court to pass an order requiring counsel in all such cases to file their abstracts and briefs in the Clerk's office of said Court on or before a certain day, prior to the succeeding term."

"Section 4271(*b*). *Cases deemed heard, when.* All cases in which briefs may be filed as provided in the preceding section shall be considered as heard at the term of said Court to which returned, and shall be determined and the decisions therein announced by said Court, so soon after said briefs are filed as may be practicable.

PRACTICE IN THE SUPREME COURT.

No. 352.

An Act to regulate practice in the Supreme Court of Georgia.

SEC. IV. *Be it enacted by the authority aforesaid*, That no writ of error shall be dismissed in the Supreme Court of this State on any ground whatever which can be removed during the term of the court to which the said writ of error is returnable, and said Supreme Court shall give such time during said term, even to the end of the same, as may be necessary to remove said ground if it can be removed during the said term

Approved September 28th, 1881.

Acts 1880–81, Sec. IV. page 123–4.

ORDERS AND RULES OF PRACTICE.

RULE—On the call of the cases, unless the plaintiff in error be present in person or by counsel, or by abstract and brief filed with the Clerk, the case called will be dismissed, and will not be reinstated except for providential cause.

Adopted February 7th, 1882. (Code of 1882, p. 1361.)

No case brought to the Supreme Court of the State of Georgia and dismissed in accordance with above rules and statutes can be reinstated except for providential cause.

Ex parte Bradley, 63 Ga. 566.

Osburn vs. Hale, Admr. 70 Ga. 731.

Brooks vs. The State of Ga. 72 Ga. 899.

Jones vs. The State of Ga. 80 Ga. 640.

The conclusion is, that it would be useless to ask the Supreme Court of the State of Georgia to reinstate this case or to grant to the plaintiff in error any relief whatever, because under the rules and decisions of that court and under the statutes of the State of Georgia, as construed by said court, such relief would be denied.

Decided Cases on Escapes.

The precise point made in this writ of error has never before been made and ruled upon in the State or Federal decisions so far as we have been able to determine by careful investigation, and we can only gather from intimations of the Court in decided cases and from the spirit and reason of the law, what is the true rule governing the case made by the writ of error and record in this case.

The point made by the record in this case is as follows:

Where one has been convicted of violation of the criminal law of the State and has made a motion for a new trial which has been overruled and has sued out a writ of error to the Supreme Court from said decision, and pending such writ of error and before the final hearing and determination of the same, in the Supreme Court, has escaped from the custody of the law, and remaining at large at the time such writ of error comes up for review, the Court refuses to hear or determine said writ of error because of the enlargement of the plaintiff in error; the question is:

1st. What direction should be given by the Supreme Court to said writ of error and what order should be passed by the Supreme Court in the premises?

2nd. In the event of the recapture of the plaintiff in error, or his surrender to the custody of the law thereafter, what direction should be given by the Court to an application from plaintiff in error after he has been so retaken into custody, for the hearing of the writ of error?

In every one of the decided cases the point came up for decision as to what should be done with the writ of error brought by the plaintiff in error who appeals from the decis-

ion of the trial judge in refusing to grant a new trial where the plaintiff in error was found guilty by the jury, and having made a motion for a new trial which was overruled, had escaped from custody after his writ of error was taken, and remained at large when said writ of error was passed upon by the Supreme Court and was a fugitive from justice when the questions as to his rights and his status under the law were passed upon and determined by the Supreme Court in such proceedings.

It will be readily seen that great and important differences arise as to the rights of the plaintiff in error under the two different state of affairs as above stated.

The decided cases defining the rights of the plaintiff in error under the facts as they appeared in said cases, may, for convenience, be divided into three classes:

1st. Those cases following the rule adopted by the Supreme Court of Georgia which dismisses the writ of error after the expiration of a fixed limit of time in the future, varying in dutation—these cases either negative the right of the plaintiff in error to have the writ of error reinstated, in the event of the surrender of plaintiff in error to custody, or his recapture is afterwards effected or are silent as to such relief, and are as follows, to-wit:

Madden vs. The State 70 *Ga.* 383.

Osburn vs. The State, 70 *Ga.* 731.

Gentry ns. The State, 91 *Ga.* 669.

McGowan vs. The People, 104, *Ill.* 100 (*s. c.*) 44 *Am. Rep.* 87.

People vs. Redinger, 57 *Cal.* 290 (*s.c.*) 36 *Am. Rep.* 32.

State vs. Wright, 32 *La. Ann.* 1017, (*s.c*) 36 *Am. Rep.* 274.

Warnick vs- The State, 73 *Ala.* 486, (*s.c.*) 49 *Am. Rep.* 59.

Wilson vs. Commonwealth, 10 *Bush.* 526, (*s.c.*) 19 *Am. Rep.* 76.

State vs. Carter, (*Mo.*) 4 *L. R. A.* 621.

Commonwealth vs. Andrews, 97 *Mass.* 544.

State vs. Genet, 59 *N. Y.* 80.

11 *S. E. Rep.* 682.

Henning vs. City of Greenville, 69 *Miss* 214.

State vs. Craighead, 44 *La. Ann. 968.*
Gatliff vs. State, 28 *S. W. Rep.* 466.
Dement vs. State, 30, *S. W. Rep.* 358.
Zardenta vs. State, 23 *S. W. Rep.* 684.

2nd. Those cases, few in number, decided in early years and of doubtful weight and authority, which maintain the right of the State to hear and decide the writ of error in the absence of the plaintiff in error and refuse any rehearing on the ground that such decision is final.

The State vs. Jacobs, *107 N. C. 772* (*s. c.*) 22 *Am. St.. Rep* 812.
State vs. Plazencia, *9 Robinson 441* (*s. c.*) *41 Am. Decision 271.*
Parsons vs, The State 22 Ala. 50.
State vs. Anderson, *111 N. C. 689.*

3rd. Those cases which refuse to hear the writ of error in the, absence of the plaintiff in error and refuse, also, to finally dismiss the same but leave the case off the docket pending the enlargement of the plaintiff in error with the right to plaintiff in error to have his case put back upon the docket when he has surrendered himself to custody or has been captured.

Smith vs. The United States, 94 *U. S.* 97.
Bonahan vs. Neb. 125 *U. S.* 692.
Bishop's New Criminal Procedure, *Vol.* 1, *Sec.* 269 (3).
31 *Maine* 592 *Appendix.*
State vs. Johnson, 21 *S. E. Rep.* (*S. C.*)

Another line of cases might be added which decides that where the prisoner escapes before his blll of exceptions has been allowed the Court will not pending his enlargement, seal his bill of exceptions.

The People vs. Genet, 59 *N. Y.* 80.
U. S. vs. Mayo, 1 *Curtis C. C.* 433.

A consideration of the cases above cited lead us to the conclusion that the rule adopted by the Supreme Court of the

State of Georgia, and followed by the Courts of various other States, is not the true rule, is not founded upon the principles of law and justice, is contrary to the spirit and enlightenment of the age, and, in effect, results in the outlawry of an escaped prisoner, and refuses to him due process of law, both under the Constitution of the State of Georgia and under the Constitution of the United States.

Constitution of the State of Georgia, Art. 1, *Sec.* 1. *Par.* 3.
Art. 1., *Sec.* 1., *Par.* 5.
Art. 1., *Sec.* 1., *Par.* 2.
Art. 1., *Sec.* 1., *Par.* 25.
Amendment 14*th of the Constitution of the United States.*

Above sections of the Constitution of the State of Georgia are quoted in the petition for writ of error and are hereby incorporated into and asked to be taken as a part of this argument.

The rule adopted in the Jacobs case, 107 N. C. 772 and followed in the 6 Robinson, and 22 Ala. is equally repugnant to the true principles of law in such cases.

The rule adopted and followed in the Smith case, 94 U. S. 97. and in the Bonahan case, 125 U. S. 692, and in the other cases cited in connection therewith, is the true rule and the one which ought to be followed by the courts in all cases, where the plaintiff in error is without the custody of the law, at the time the action is taken upon his writ of error.

The true rule in cases like the one at bar where the plaintiff in error submits himself to the custody of the law and demands a hearing of his writ of error, after the right so to be heard has been suspended because of his escape, is to grant such rehearing, as it is definitely and clearly intimated in the Smith and Bonahan cases and in the other cases cited in connection therewith, that the court will allow.

The Smith case, 94 U. S., 97, was docketed in the U. S. Supreme Court on Dec. 29th, 1870, was dismissed for want of prosecution, was subsequently reinstated, and at the October Term, 1876, the Court set it down for argument, with direc-

tion "that unless plaintiff in error submitted himself to the jurisdiction of the Court by the first day of the next term, the cause should be left off the docket."

The same direction was given in the Bonahan case, 125 U. S. 692, except that the direction given by the Court was "that the case should be left off of the docket until direction to the contrary."

In the Johnson case, 21 S. E. Rep. 806., decided by the Supreme Court of South Carolina, the Court "dismissed the appeal, but without prejudice to the fugitive's right to move to have his appeal reinstated, provided such motion be made, at the first ensuing term after the Court has reacquired jurisdiction."

In the Warnick case, 73 Ala. 486, the Court said "that by escaping the prisoner shall be adjudged to have waived at least for the time being the right to be heard either by himself or his counsel."

In State vs. Colby, 61 N. W. Rep. 187 (Iowa) "Defendant was convicted in the Justice's court of misdemeanor, and pending appeal to the District court, fled to another State. He afterwards appeared in the District court and demanded a trial. The motion to dismiss his appeal was denied."

By a review of the cases cited in this brief in which the rule of the Georgia court, dismissing the writ of error, was adopted, it will be seen that a majority of the cases, decided by the courts of states other than the State of Georgia, allow plaintiff in error the whole of the term succeeding the term to which his writ of error was brought, in which to surrender himself to the custody of the law, and to move for a reinstatement of his writ of error, we submit, therefore, that the order of May 6th, 1895, passed by the Supreme Court of Georgia in this case, finally dismissing the writ of error, was a denial to plaintiff in error of due process of law under tbe Constitution of the State of Georgia, and under the Constitution of the United States. Following the rule adopted by the majority of the states other than the State of Georgia, plaintiff in error should have been allowed at least until October 5th,

1895, in which to surrender himself to the custody of the law and to move for a reinstatement of his writ of error.

(See cases herein cited.)

In the Madden case, 70 Ga. 383, the case was not finally dismissed until the end of the call of the cases on the Docket for that Circuit at the term succeeding the escape. The same time was given before final dismissal in the Gentry case 91 Ga. 669.

Evidence of Escape.

An examination of the transcript of record in this case produces no evidence by which it was brought to the attention of the Supreme Court at the time the orders complained of were granted, of the fact of the escape and enlargement of the plaintiff in error at the time said orders were granted; and according to the ruling of the courts in the cases above cited such evidence was necessary before such orders could be passed, and the passing of said orders in the absence of such evidence was a deprivation to plaintiff in error of due process of law.

State vs. Wright, 32 La. Ann. 1017.

Our conclusion of the whole matter, from a review of the cases above cited is, that the decision of the Supreme Court of the State of Georgia in finally dismissing the writ of error in this case deprives plaintiff in error of due process of law by the outlaw methods. In so far as it affects the rights of the plaintiff in error, the lynch or mob law method would accomplish the same result and would have as much foundation in law and justice; the three methods are equally repugnant to the Constitution and law of the United States and of the State of Georgia, and to the civilization and enlightenment of the age.

W. C. GLENN,
DANIEL W. ROUNTREE,
Counsel for Plaintiff in Error.
401-2-3-4-5-6 Temple Court, Atlanta, Ga.

Office Supreme Court, U. S.
FILED.
JAN 18 1897
JAMES H. McKENNEY,
CLERK.

166-138

Supreme Court of the United States.

No. 641.

OCTOBER TERM, 1896.

THOMAS ALLEN, Plaintiff in Error,

vs.

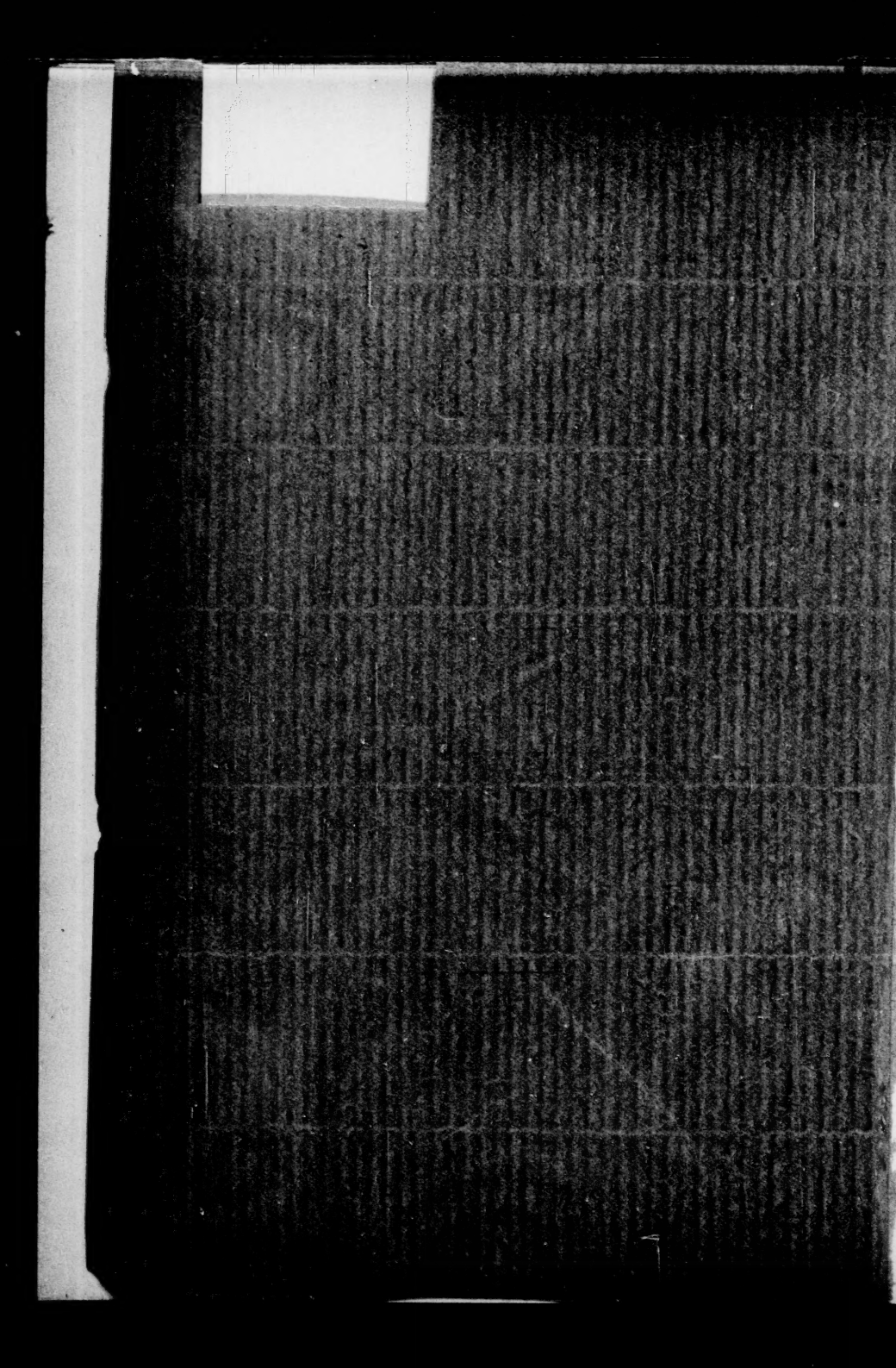
THE STATE OF GEORGIA, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF GEORGIA.

Brief and Argument of J. M. Terrell,

Counsel for Defendant in Error.

ATLANTA, GA.:
GEO. W. HARRISON, STATE PRINTER.
Franklin Printing and Publishing Company.
1896.



Supreme Court of the United States.

No. 641.

OCTOBER TERM, 1896.

THOMAS ALLEN, Plaintiff in Error,

vs.

THE STATE OF GEORGIA, Defendant in Error.

IN ERROR TO THE SUPREME COURT OF GEORGIA.

Brief and Argument of J. M. Terrell.

Counsel for Defendant in Error.

ATLANTA, GA.:
GEO. W. HARRISON, STATE PRINTER.
(Franklin Printing and Publishing Company.
1896.

SUPREME COURT OF THE UNITED STATES.

THOMAS ALLEN, Plaintiff in Error, *vs.* THE STATE OF GEORGIA, Defendant in Error.	No. 641 October Term, 1896. In Error to the Supreme Court of Georgia.

BRIEF AND ARGUMENT OF COUNSEL FOR DEFENDANT IN ERROR.

STATEMENT OF CASE.

In November, 1894. Thomas Allen was convicted of murder in the Superior Court of Bibb County, and sentenced to death. After such conviction and sentence he made a motion for a new trial in that Court, as provided by the laws of Georgia, which was refused, and his case was then taken by writ of error to the Supreme Court of Georgia, returnable to the March Term, 1895, and was assigned for a hearing on the 4th day of March, 1895 When the case was called on that date it was made to appear to the court by proper affidavits, which the court considered sufficient evidence for that purpose, that Thomas Allen since his conviction and sentence aforesaid had escaped from jail, and was at that time at large and a fugitive from justice, whereupon the court ordered that the writ of error be dismissed after sixty days, if the said Allen did not surrender himself to the custody of the proper officer or was not recaptured within that time, evidence of the existence of either of these facts to be produced to the Court by said Allen within the sixty days. On May 6, 1895, which was more than sixty days thereafter, the Snpreme Court of Georgia passed the following order:

"This case came before the Court upon a transcript

of the record from the Superior Court of Bibb County; and it appearing that the plaintiff in error did not, within the time limited in the order heretofore passed in this case, surrender himself to the custody of the proper officer so as to be subject to the jurisdiction of this Court, and furnish evidence thereof by filing the same in the Clerk's office, and it further appearing that he has not been rearrested since his escape from jail, it is now ordered that the writ of error in this case be finally dismissed."

This judgement, on July 13, 1895, was made the judgment of the Superior Court of Bibb County.

Afterwards Thomas Allen was recaptured, and on the 29th day of April, 1896, was re-sentenced by the Judge of the Superior Court presiding in Bibb County, and before the execution of such re-sentence Thomas Allen made application to the Supreme Court of the United States for a writ of error to the Supreme Court of Georgia, which was duly granted. It was set out in this application, amongst other grounds, that the dismissal of the writ of error by the Supreme Court of the State of Georgia was in violation of the Constitution of the United States, in that such dismissal was a denial of due process of law by the Supreme Court of Georgia to Thomas Allen.

Paragraph 6 of Section 2 of Article 3 of the Constitution of the State of Georgia, (Code sec. 5134) is as follows:

"The Supreme Court shall dispose of every case at the first or second term after such writ of error is brought; and in case the plaintiff in error shall not be prepared at the first term to prosecute the case—unless prevented by providential cause—it shall be stricken from the docket, and the judgment below shall stand affirmed."

The terms of the Supreme Court of Georgia begin on the first Monday in March and the first Monday in October of each year. See Georgia Laws, 1884-5, page 45.

BRIEF OF ARGUMENT.

The action of the Supreme Court in dismissing the writ of error is in harmony with the practice of that court for years in disposing of such cases, and with the practice of courts of last resort in many of the States throughout the Union, and consistent with the practice of this court when the provision of the State Constitution above set out is taken into consideration.

In the case of Commonwealth v. Andrews, 97 Mass., 543, where the defendant had escaped during the pendency of his exceptions in the Supreme Court, it was held that, "the defendant, by escaping from jail where he was held for the purpose of prosecuting these exceptions and abiding the judgment of the court thereon, has voluntarily withdrawn himself from the jurisdiction of the court. He is not present in person, nor can he be heard by attorney. A hearing would avail nothing. If a new trial should be ordered, he is not here to answer further; if the exceptions are overruled, a sentence cannot be pronounced and executed upon him.

* * * * * * * *

"So far as the defendant had any right to be heard under the constitution, he must be deemed to have waived it by escaping from custody and failing to appear and prosecute his exceptions in person, according to the order of court under which he was committed."

In the case of Sherman v. Commonwealth, 14 Grat., 667, where Sherman was convicted of a felony and was sentenced to a term in the penitentiary, he obtained a writ of error from the Court of Appeals, and while it was pending in that court he broke jail and was at large. Upon motion the court dismissed the writ of error, unless it should be made to appear to the court on or before a certain day that he was in the custody of the proper offi-

cers of the law. This judgment of the Virginia Court of Appeals was afterwards approved in 20 Grat., 723.

In the case of Genet, 59 N. Y.. 80, where Genet had been convicted of a felony in the Court of Oyer and Terminer, and pending the application for the settlement of a bill of exceptions had been committed to custody to await sentence, and before the application was disposed of, or sentence pronounced, he escaped from custody. The court declined to proceed with and complete the settlement of the proposed bill on the ground that the defendant was at that time a fugitive at large. From this judgment the matter was brought on appeal before the Court of Appeals, where it was affirmed. In delivering the opinion of the court, Johnson J., said:

"The whole theory of criminal proceedings is based upon the idea of the defendant being in the power, and under the control of the court, in his person. While the Constitution and the statute provide him with counsel, and the statutes give the right of appearance by attorney in civil cases, they are silent in respect to the representation of persons charged with felony by means of an attorney, and in regard to those charged with lesser offences, the statutes permit them to be tried in their absence from court, only on the appearance of an attorney duly authorized for that purpose. This authority it has been held must be special, and distinctly authorize the proceedings. (People v. Petry, 2 Hilt., 525; People v. Wilkes, 5 How. Pr., 105). Even in the absence of statutory regulations this rule has been enforced in the courts of the United States. (Unted States v. Mayo, 1 Curtis' C. C., 433). In criminal cases there is no equivalent to the technical appearance by attorney of defendant in civil cases, except the being in actual or constructive custody. When a person charged with felony has escaped out of custody, no order or judgment, if any should be made, can be en-

forced against him; and courts will not give their time to proceedings which, for their effectiveness, must depend upon the consent of the person charged with crime. The fact that in this State, the law allows proceedings on writs of error without requiring the actual presence of the criminal in court, does not at all conflict with the view that steps will not be allowed to be taken on his behalf, when he is no longer in custody or on bail, but has fled from the custody of the law. His presence in court is necessary when he is to be tried, or when some judgment or sentence involving his corporal punishment is to be pronounced. His being in custody is necessary to any step for or against him, except such as may be taken to bring him again into custody. All the cases which consider the question, seem to concur in the view that an escaped prisoner cannot take any action before the court."

In the case of People *vs.* Reddinger, 55 Cal. 290, Reddinger was convicted of murder in the first degree and sentenced to death. He appealed to the Supreme Court, and when his case was called for argument the court dismissed the appeal on the ground that since the same had been taken the defendant had escaped from jail and was no longer in custody to abide the sentence of the court, unless he would by a certain day return to the custody of the proper officers of the law. After a thorough consideration of a large number of cases which had been decided by courts of last resort in other States, and of the principles announced in Blackstone's Commentaries and Chitty on Criminal Law, Thornton, J., speaking for the court, said:

"In fact courts have no jurisdiction over persons charged with crime, unless in custody, actual or constructive. It would be a farce to proceed in a criminal cause, unless the court had control over the person

charged, so that its judgment might be made effective. It is true that an indictment may be found against one not in custody, but steps are directed to be taken in such case to secure his person. And unless an arrest is effected, the cause can proceed no further. The defendant is arraigned in person, and pleads in person, unless in case of misdemeanor. Every plea must be oral.

"By 1253 of the penal code, it is provided as to criminal causes that 'the judgment may be affirmed if the appellant fail to appear, but can be reversed only after argument, though the respondent fail to appear;' and by 1255, that 'the defendant need not personally appear in the appellate court."

"It may be urged that, inasmuch as the defendant need not personally appear in the appellate court, he has a right to appear by counsel, whether he is in custody or not. For the reasons here given, sustained by the cases cited, we think the defendant has no longer a right to appear by counsel, when he has escaped from custody, until he has returned into custody. By breaking jail and escaping he had waived the right to have counsel appear for him. In fact his right to constitute counsel and invest him with authority no longer exists while his absence from custody continues."

This court, in the case of Smith *vs.* United States, 94 U. S. 97, refused to hear a criminal case, unless the party suing out the writ of error was where he could be made to respond to any judgment rendered. In delivering the opinion of the court, Mr. Chief Justice Waite said:

'It is clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render. In this case it is admitted that the plaintiff in error has escaped and is not within

the control of the court below, either actually, by being in custody, or constructively, by being out on bail. If we affirm the judgment, he is not likely to appear to submit to his sentence. If we reverse it and order a new trial he will appear or not, as he may consider most for his interest. Under such circumstances we are not inclined to hear and decide what may prove to be only a moot case." This decision was afterwards approved in Bonahan *vs.* Nebraska, 125 U. S. 692. In the which case it appeared that during the pendency of the writ of error the plaintiff had escaped and was not within the custody of the court below, and it was ordered that the case be set aside, and that unless the plaintiff in error was brought or came within the jurisdiction and under the control of the court below on or before the last day of that term the case be thereafter left off the docket until directions to the contrary.

The first time the question presented by the writ of error under consideration was made before the Supreme Court of Georgia was in the case of Madden *et al vs.* the State, 70 Ga. 383. In that case Madden *et al* had been convicted of robbery and sentenced to twenty years in the penitentiary, and pending the writ of error in the Supreme Court of Georgia they made their escape, and had not been recaptured or surrendered when the matter was brought to the attention of the court by affidavit of the jailer upon a motion of counsel for the State to dismiss the writ of error. The court allowed until the last day of the term for these defendants to submit themselves to jurisdiction before dismissing the cases, and no proof having reached the court of their surrender or recapture on the last day of the term the cases were dismissed, and in delivering the opinion of the court, Jackson, Chief Justice, said:

"In our judgment, they have thus deprived themseives

of all right further to prosecute their case here. Their act is an open defiance of the law, and thereby they have deprived themselves of all legal right further to prosecute this writ of error."

In the case of Osborn v. the State, 70 Ga., 731, where upon the call of the case counsel for plaintiff in error stated in his place that his client had escaped and remained without the jurisdiction of the court, the writ of error was dismissed.

In the case of Gentry v. State, 91 Ga., 669, a similar question was presented to the Supreme Court of Georgia. Gentry had been convicted of murder and sentenced to death. He made a motion for a new trial, which was overruled, and his case was carried to the Supreme Court, where it was argued, and after argument, but before the rendition of the judgment of the Supreme Court, he escaped from jail and was at large. It seems to have been conceded that if Gentry had escaped from jail before his case was heard and argued before the Supreme Court, there would have been no doubt of the propriety of dismissing it, but counsel for Gentry insisted that inasmuch as his case had been argued, a different rule should prevail, and that the plaintiff was entitled, as a matter of right, to a decision of his case upon its merits. In a well considered opinion by Lumpkin, Justice, a large number of cases decided by courts of last resort were carefully reviewed, and in concluding Justice Lumpkin said :

" In several of these cases the writ of error was summarily dismissed. In others, however, the plaintiff in error was afforded an opportunity to surrender himself to the proper custody and submit to the jurisdiction of the court. On the whole, we are satisfied, after reflection, that the latter method of procedure is the safer and better practice, and accordingly it has been followed in the pres-

ent case. By observing this practice a person convicted of crime is not absolutely cut off from all right to have the legality of his conviction tested by the reviewing court; but at the same time he is given to understand that the court will not undertake to decide his case and leave him free to accept or reject, as he may please, the judgment it may render."

From the above it appears to be well settled that a defendant is not entitled to have his case heard and determined by a court of last resort so long as he voluntarily places himself beyond the jurisdiction of that court, or beyond the jurisdiction of the trial court. The question as to whether the case of a defendant who places himself in such a position shall be summarily dismissed, or he be allowed time in which to place himself within the jurisdiction of the court. is one of practice to be disposed of as the court may see proper. The Supreme Court of Georgia has adopted a practice allowing such defendants time in which to return to the jurisdiction of the court. This is exceedingly liberal to a defendant who by his escape defies the judgment of the court.

It may be contended that in the case now under consideration the Supreme Court of Georgia erred in not setting aside the case and leaving the same from the docket until further ordered, as was done by the court in the case of Bonahan in 125 U. S., 692. It may be said in reply to such a contention that the question is purely one of practice to be determined by the court, but over and beyond this stands that provision of the Constitution of the State of Georgia which requires the Supreme Court to dispose of every case at the first term, unless prevented by providential cause. See Paragraph 6, Section 2, Article 6 of the Constitution of 1877. This case was brought to the March term, 1895, of the Su-

preme Court of Georgia, and set for a hearing on the 4th day of March. On that day it was made to appear to the court that Allen had escaped and was at large. The record does not show that he was again within the jurisdiction of the court until April, 1896, which was not only after the adjournment of the first, but after the adjournment of the second term of the court to which his case was returnable, hence so far as the facts of this case are concerned, it is not a practical question as to whether the Supreme Court erred in not following the rule laid down in the Bonahan case.

The construction which the Supreme Court of Georgia places upon the laws of this State relative to the disposition of writs of error in that court is final, unless such a construction violates some provision of the Constitution of the United States. The construction which the court placed upon the law relative to the writ of error now under consideration violates no provision of the Federal Constitution, most certainly not the provision relative to due process of law. In the case of McKane v. Durston, 153 U. S., 684, this court held that an appeal from a judgment of conviction to a higher court was not a matter of absolute right, independent of constitutional or statutory provisions allowing it, and that the State might accord it to a person convicted of crime upon such terms as it sees proper. In delivering the opinion of the court, Mr. Justice Harlan said:

"A review by an appellate court of the final judgment in a criminal case, however grave the offense of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review. A citation of authorities upon the point is unnecessary."

In construing the law and the Constitution of the State

of Georgia applicable to writs of error pending in the Supreme Court of Georgia, that court decided in the case of Allen as it has done in a number of other cases, that the writ of error should be dismissed if the plaintiff in error voluntarily placed himself beyond or without the jurisdiction of the court. Allen, has therefo process of law so far as this case is concerned

J. M. TERRELL,
Of Counsel for Defendant in Error.